

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF VIRGINIA  
 RICHMOND DIVISION

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 JEROME SKOCHIN, individually, and :  
 on behalf of all others similarly : Civil Action No.  
 situated : 3:19CV49  
 :  
 vs. :  
 : July 14, 2020  
 GENWORTH LIFE INSURANCE COMPANY :  
 :  
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COMPLETE TRANSCRIPT OF THE MOTIONS HEARING  
 BEFORE THE HONORABLE ROBERT E. PAYNE  
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Case number 3:19CV49, Jerome Skochin, et al., versus Genworth Life Insurance Company, et al. The plaintiffs are represented by Brian Penny, Jonathan Petty, and Stuart Davidson. The defendants are represented by Michael Duvall, Catharine Luo, and Heidi Siegmund. The interested parties Ronald M. Agulnick and Toby H. Agulnick are represented by Jeffrey Dailey and Elizabeth Turner. Are counsel ready to proceed?

MR. PENNY: We are, Your Honor.

MR. DUVALL: Yes.

THE COURT: Who is on the telephone, on the Zoom? Is anybody on?

THE CLERK: Yes, Your Honor.

THE COURT: We had a number of people who were on before.

MR. FERRARA: Your Honor, this is Ralph Ferrara. I'm participating by telephone only. I'm an objector.

THE COURT: I have the following: Ann Ashton who is a colleague of one of the objectors. Who is that?

THE CLERK: Ralph Ferrara, sir.

THE COURT: Ann Ashton is a colleague of Ralph Ferrara; is that right?

MS. ASHTON: Yes, sir.

1 THE COURT: Are you a lawyer or friend or what?

2 MS. ASHTON: I'm his law partner.

3 THE COURT: Okay. Stacey Klein, K-l-e-i-n. Are you  
4 here?

5 THE CLERK: Ms. Klein is connected, Judge, but hasn't  
6 been able to confirm that she's able to hear me.

7 THE COURT: All right. Janice Wynn, W-y-n-n, are you  
8 here? We don't have her?

9 MS. WYNN: Yes, sir, I'm here.

10 THE COURT: Did you file an objection?

11 MS. WYNN: No, sir.

12 THE COURT: And your interest is what?

13 MS. WYNN: Well, frankly, I was late to find out  
14 about the class action. I have a long-term care policy that  
15 meets the criteria for the suit, and I had moved from Texas to  
16 Florida, so I'm just playing catch-up.

17 THE COURT: You are just interested at this point;  
18 you don't have any objection.

19 MS. WYNN: No, sir.

20 THE COURT: All right, thank you. Annie -- is it  
21 L-a-i-s-o-n?

22 MS. LARSON: Yes, Your Honor, I'm Annie Larson. I'm  
23 an in-house counsel at Genworth Financial.

24 THE COURT: Annie Larson, L-a-r-s-o-n, all right. Is  
25 it -- is the last name Y-b-a-r-r-a or B-a-r-r-a?

1 THE CLERK: Y-b-a-r-r-a, Mr. Ybarra.

2 MR. YBARRA: Yes, it's Y-b-a-r-r-a.

3 THE COURT: Did you file an objection?

4 MR. YBARRA: I did not. I'm a class member. I'm  
5 interested.

6 THE COURT: All right, sir. Lathan Crain, C-r-a-i-n,  
7 are you here?

8 MS. CRAIN: Yes, I'm just a policyholder. I have no  
9 objections.

10 THE COURT: All right, thank you, ma'am. Margaret  
11 Mahon, M-a-h-o-n? Is Margaret Mahon here?

12 MS. MAHON: Yes, Your Honor. I'm a member, and I'm  
13 just here to listen.

14 THE COURT: Thank you. Sean Bell, counsel for  
15 Genworth. Are you in-house counsel or with a law firm?

16 MR. BELL: Good morning, Your Honor. I'm in-house  
17 counsel for Genworth.

18 THE COURT: Sherri, S-h-e-r-r-i, Snider, S-n-i-d-e-r.  
19 Ms. Snider, are you here?

20 MS. SNIDER: I am.

21 THE COURT: I can hardly hear you.

22 MS. SNIDER: Hello. Can you hear me?

23 THE COURT: Very vaguely.

24 MS. SNIDER: I'm a class member. I'm just here to  
25 listen.

1 THE COURT: Thank you, ma'am. Mr. Luck is an  
2 objector. Mr. Abramson, Glen Abramson, counsel for the  
3 plaintiff. What firm are you with?

4 MR. ABRAMSON: Good morning, Your Honor. I'm with  
5 Berger Montague. I'm co-counsel with Mr. Penny, Mr. Petty, and  
6 Mr. Davidson.

7 THE COURT: And you are not planning to speak.

8 MR. ABRAMSON: That's correct, Your Honor. I'm just  
9 listening in.

10 THE COURT: I have one here, Ms. Brown, called Alan  
11 with no name at the end.

12 THE CLERK: Judge, I haven't been able to connect  
13 with Alan.

14 THE COURT: Is there somebody named Alan on the line  
15 who can talk with us?

16 THE CLERK: I've asked him to unmute, but I have not  
17 been able to hear him.

18 THE COURT: All right. Ryan --

19 MR. DELATORRE: Yes, Your Honor.

20 THE COURT: Who are you?

21 MR. DELATORRE: I'm an attorney with the California  
22 Department of Insurance. I'm here to listen as an interested  
23 observer.

24 THE COURT: And what is your name?

25 MR. DELATORRE: Ryan Delatorre.

1 THE COURT: All right. Is this Louis Brown?

2 THE CLERK: Louis Brownstone.

3 THE COURT: Mr. Louis Brownstone, are you here?

4 MR. BROWNSTONE: I'm an interested party. I'm a  
5 broker in California with 3,000 Genworth policyholders affected  
6 by this suit.

7 THE COURT: And you have no objections?

8 MR. BROWNSTONE: No objection.

9 THE COURT: All right, thank you. Did you ever  
10 determine Alan and what his last name is?

11 THE CLERK: No, sir.

12 MR. CHIBNIK: Your Honor, can you hear me?

13 THE COURT: Who is you?

14 MR. CHIBNIK: I'm sorry. I am Alan. My last name is  
15 Chibnik. I'm a policyholder with no objection.

16 THE COURT: How do you spell your last name?

17 MR. CHIBNIK: C-h-i-b as in boy, n as in Nancy, i-k.

18 THE COURT: All right. And does that leave us  
19 without Ms. Wynn, or were you able to connect with her?

20 THE CLERK: Yes, I was able to speak with her prior.  
21 I'm asking her to unmute now.

22 THE COURT: Ms. Wynn?

23 MS. WYNN: Yes, sir, I'm here.

24 THE COURT: Do you have an objection, Ms. Wynn?

25 MS. WYNN: No, I do not.

1 THE COURT: All right. Is there anybody on the phone  
2 whose name I have not called?

3 THE CLERK: Your Honor --

4 MR. JACOBS: Your Honor, this is Saul Jacobs. I just  
5 got on. I was never sent the new invitation, and so it took  
6 awhile, but I am here, and I would like -- we said we would  
7 continue my objection today. Thank you.

8 THE COURT: The plaintiff is making comments on all  
9 of the objections. Is there anybody else on the phone whose  
10 name I have not called?

11 MR. DAVIDSON: Yes, Your Honor, good morning. This  
12 is Stuart Davidson. I'm Mr. Penny's co-counsel. I was in  
13 person with Your Honor last week but couldn't make the trip  
14 this week, so I'm appearing by Zoom.

15 THE COURT: You are counsel for the plaintiff?

16 MR. DAVIDSON: Yes, sir.

17 THE COURT: And you'll not be speaking.

18 MR. DAVIDSON: No, sir.

19 THE COURT: Is there anyone else? All right. So we  
20 have the same basic situation as we had last week, but we have  
21 more people who are class members listening. I'm not -- I  
22 don't think I've told this to class members because there  
23 weren't any class members last time that I recall who did not  
24 object, but if you wish -- if you're a class member and you  
25 wish to say something, you are entitled to say something if you



1 so desire, and you need to let Ms. Brown know, and I will call  
2 on you, or if, in fact, you are not being called on and you can  
3 reach us, then politely intervene and give your name and say  
4 you'd like to say something, and we'll get you on the roster.

5 As of right now, are any of the class members, Ms.  
6 Wynn, Mr. Ybarra, Mr. Craine, Ms. Mahon, Ms. Snider, Mr.  
7 Chibnik, Louis Brownstone, are there any of you at this time  
8 who know you wish to say anything? If so, give me your name.

9 There being no request, then the floor remains open  
10 to you if you would so desire based on what you hear as we  
11 proceed.

12 All right, I believe that when we adjourned, Mr.  
13 Penny was about to tell me about the simple elegance of  
14 something, and you were responding to whose objection at the  
15 time you were talking, Mr. Penny?

16 MR. PENNY: Good morning, Your Honor. Brian Penny on  
17 behalf of the plaintiffs in the class. I believe as we were  
18 adjourning on Friday, I was about to tell you what the  
19 beautiful thing about the settlement was for Mr. Jacobs.

20 THE COURT: Jacobs or Ferrara? I have you talking  
21 after my comments, my notes on Ferrara, but I don't remember.  
22 Are you specifically dealing with Mr. Jacobs' objection now?

23 MR. PENNY: I was when I said that statement, and I  
24 can -- if you'd like, I can try to pick up right where we left  
25 off, but here's where I thought I would start the presentation

1 today: I wanted to begin --

2 THE COURT: I want you to deal with the objectors'  
3 objections, and I want you to address the question of  
4 predominance, and I want you to address the question of why we  
5 can't let the insurance -- go to the regulators and come back  
6 after you go to the regulators and we know if they're going to  
7 try to change anything in the settlement proposal.

8 So I'll give you the floor to decide it, but -- how  
9 you wish to proceed, but you tell me what you are talking  
10 about, what topics, so I make sure that I am focusing on what  
11 you are talking about.

12 MR. PENNY: Absolutely, and just to lay out -- the  
13 way I wanted to proceed this morning, Your Honor, was to talk  
14 first about the aggregate value of the settlement because I  
15 think it's important to set the table and let the Court know  
16 exactly what the financial and monetary benefits are to the  
17 class, because I think that's an important perspective to have  
18 as we go back and address the objections.

19 Then I did want to then take on each of the objectors  
20 in order, Mr. Jacobs, Mr. Ferrara, and then the Agulnicks'  
21 objection and address everything that was raised after Friday's  
22 hearing that hasn't been addressed yet. If that's okay with  
23 Your Honor, I'll proceed that way. If you prefer a different  
24 organization, I'll be happy --

25 THE COURT: That's fine. It's your show. I'm happy

1 for you to proceed in that way, but you just need to be telling  
2 me what you are doing, and then in addition to that, I'll need  
3 to hear if they have -- who has the burden on an objection? Do  
4 you have -- once it's raised, do you have the burden of proving  
5 that there's no merit to it?

6 MR. PENNY: The objector has -- Your Honor, the  
7 objector has the burden to establish their objection including  
8 to establish the factual basis and predicate that underlies it.  
9 After that, it's kind of open game. It's not a shifting of  
10 burdens.

11 And that is actually something that we will address  
12 with each of the objectors, but I intend to make it very clear.  
13 As I'm transitioning to dealing with an objector, I will make  
14 that very clear for Your Honor.

15 THE COURT: I guess somebody has told you you need to  
16 do that with me so I can keep track of things.

17 MR. PENNY: So on the value of the settlement, I  
18 think before recent events, it was my opinion that the best way  
19 to evaluate the value of the settlement was to look at an  
20 individual class member's circumstance and compare where they  
21 would be before the settlement to where they are after the  
22 settlement and to what the claims were that they alleged to  
23 what they're getting in the settlement.

24 With the benefit of some more hindsight now, I think  
25 it's actually more important to show to the Court what the

1 aggregate monetary value is for the entire class, because I  
2 think that's a useful perspective. And the way I'm going to do  
3 that is we're going to go through each of the special election  
4 options that have cash damages payments, and I'm going to tell  
5 Your Honor what the average cash damage payment will be for  
6 each option.

7 I will also tell Your Honor what the average premium  
8 reduction will be for each of those options, and then we will  
9 look at Genworth's historical data on what rate class members  
10 have elected similar options in the past and use that to inform  
11 the calculation of the aggregate monetary damages that will be  
12 paid out in the settlement.

13 Then I will address the very valuable enhanced  
14 paid-up benefits that come with one of the options of the  
15 settlement. So we'll go through and look at the monetary and  
16 enhanced coverage benefits for each option, and then we'll look  
17 at them as a whole.

18 THE COURT: That's really not the way it's been done  
19 in the papers.

20 MR. PENNY: That's right, Your Honor.

21 THE COURT: So this is entirely new.

22 MR. PENNY: I'm going to show you --

23 THE COURT: This is an entirely new way of  
24 approaching the value of the settlement; is that right?

25 MR. PENNY: Not entirely new, Your Honor, because I'm

1 going to show you how we got to what we call the conservative  
2 estimate of \$100 million in cash damages payments to the class.

3 THE COURT: Right, and that is a conclusion that  
4 appears in your papers.

5 MR. PENNY: Yes, Your Honor.

6 THE COURT: To which somebody objected. I don't  
7 remember who it was.

8 MR. PENNY: It was the Agulnicks, Your Honor.

9 THE COURT: So now you're going to tell me all that,  
10 and I don't have any evidence to support it, I don't have a  
11 brief that deals with it, and the objectors don't have any way  
12 of testing it.

13 So I guess my original -- my question is, do we need  
14 to adjourn the hearing, allow you to file a supplemental paper,  
15 and let everybody get on board with the same information so  
16 that the judgments can be made in perspective of a record that  
17 everybody understands? What's your view on that?

18 MR. PENNY: I would not --

19 THE COURT: I guess my -- what I'm trying to say is  
20 this: I don't have anything in front of me, and I'm going to  
21 have to be writing down what you say or get the court reporter  
22 to type it up for me and see it, and then I can understand and  
23 digest it.

24 I haven't prepared for what you are saying, and you  
25 are, in fact, approaching the question of the value of the

1 settlement itself in somewhat a different way than is presented  
2 in your papers. So I'm soliciting your advice about how it is  
3 you think we ought to proceed in view of that information.

4 MR. PENNY: Yes, Your Honor. I think what I'll be  
5 representing to you today as an officer of the court are facts,  
6 and to the extent Your Honor would like them in an even more  
7 formal presentation, I think we're happy to put together a  
8 declaration that will lay all this out and will be signed and  
9 sworn to.

10 THE COURT: I'm not questioning the verity of it. I  
11 trust lawyers when they appear before me to recognize they're  
12 officers of the court. I respect them as such, and I rely on  
13 them as such, and if in the course of things there's something  
14 that's called into question that I need to have explained, I  
15 expect them to be able to explain it, because even the best of  
16 statements can be misunderstood, misinterpreted, and that's  
17 sort of the business we're in, is getting to the bottom of it  
18 all.

19 So I don't question -- I don't think that Mr. Dailey  
20 questioned the integrity of the representation. I think he was  
21 saying I don't know the factual predicate for it, if I  
22 understand it, and he's shaking his head yes back there. But  
23 here's the problem: How many different options are there?

24 MR. PENNY: There are five, Your Honor.

25 THE COURT: So you're going to go through a general

1 situation, and then you're going through all five options.  
2 Then you're going to go through the damage payments, and then  
3 the statistical base for how things have evolved, and you're  
4 going to do all that, and I'm not -- I appreciate very much  
5 your thought process in which you think I am intellectually  
6 capable of doing that, but I have to confess to you I don't  
7 know if I can assess all that in that fashion.

8 So I'm going to have to have supplemental briefing or  
9 something, and it occurs to me that it might be helpful for you  
10 to go through it today so everybody understands what we're  
11 doing and then for you to present something that puts it all  
12 together in a fashion that I can be sure I'm comfortable with,  
13 and I will do as I'm sure others will do. I'll be glad to  
14 check the factual references which you cite in this hearing and  
15 the papers, and then we'll go from there.

16 MR. PENNY: Okay, Your Honor.

17 THE COURT: We'll get started with the way you want  
18 to do it, and then we'll go on with the other things that I  
19 did, and it will help me to understand what's going on.

20 MR. PENNY: Very fair, Your Honor, and thank you.

21 THE CLERK: Judge, did you want me to admit Mr.  
22 Ferrara?

23 THE COURT: Yes. I thought I said yes. His law  
24 partner is still in; right?

25 THE CLERK: Yes, sir.

1           THE COURT: Anybody who wants in, just let them in  
2 and tell me they're in. That's okay. You be the gatekeeper on  
3 that.

4           THE CLERK: Yes, sir.

5           MR. PENNY: So I want to start with the four options  
6 that present cash damages payments to the class if they are  
7 elected. The first such option is option two. Option two is a  
8 nonforfeiture option that, if elected, will result in a cash  
9 payment to the class member equal to all the premiums that  
10 class member paid between 2016 and 2019. So that's four years  
11 of premium payments. The cash value, the average cash value  
12 for that payment is \$10,540.

13          THE COURT: When you say it's a nonforfeiture, do you  
14 mean they keep the policy?

15          MR. PENNY: They keep a policy. They still have a  
16 paid-up benefit on the policy that is equal to the amount of  
17 premiums they have paid to Genworth in the years for which  
18 premiums were not refunded.

19                So, for example, in this example when somebody is  
20 getting a refund of \$10,500 in premiums, if they've paid  
21 \$30,500 in premiums over the life of the policy, they'll get  
22 10,500 back in cash, and they'll still have a paid-up policy  
23 benefit worth \$20,000.

24          THE COURT: The policy will be worth \$20,000.

25          MR. PENNY: It will pay benefits up to \$20,000.



1           THE COURT: In that scenario, they have paid whatever  
2 the premium is, and as of that time in your example here --  
3 let's say it's through 2015. If what they have paid in  
4 achieves a benefit of \$20,000, they'll keep that benefit.

5           MR. PENNY: I think that's right.

6           THE COURT: The benefit is not linked to the total  
7 premiums paid, it's linked to the value of what the total  
8 premiums paid would have -- would provide; is that what you are  
9 saying?

10          MR. PENNY: Let me back up and make sure that we're  
11 not crossing signals, because I want to make sure you  
12 understand how the settlement works. Outside the settlement,  
13 if a policyholder is facing a rate increase and decide they  
14 don't want to pay any premiums anymore, they can choose a  
15 nonforfeiture option.

16               What the nonforfeiture option does is it says you  
17 don't have to pay any more premiums in the future, you still  
18 have a policy with the same basic terms and conditions that you  
19 had before, but the policy, if you qualify for benefits, will  
20 pay out up to a certain limit, and the limit has always been  
21 set as the amount of premiums that have paid to Genworth over  
22 the life of the policy.

23               So if the policyholder had paid \$30,000 in premiums  
24 to Genworth and then decided they don't want to pay premiums  
25 anymore, they elect the nonforfeiture option, they will retain

1 a policy that will pay benefits up to that \$30,000. That's  
2 outside the settlement.

3 THE COURT: So that same benefit obtains, and that is  
4 the limit --

5 MR. PENNY: And actually --

6 THE COURT: -- paid premiums represent the limit of  
7 the coverage in the paid-up benefit.

8 MR. PENNY: Precisely right. And, actually, a little  
9 risk in changing horses here, I actually think that since we  
10 just established that understanding of the nonforfeiture  
11 option, we should probably talk about option one first. Option  
12 one is not a cash damages payment option, but option one is the  
13 enhanced paid-up benefits for nonforfeiture elections.

14 THE COURT: All right.

15 MR. PENNY: The way that option one works is anybody  
16 who wants to elect a nonforfeiture option in the settlement and  
17 anybody who has already elected a nonforfeiture option has the  
18 option to not pay any more premiums to Genworth and to have  
19 that paid-up benefit doubled.

20 So in the example that I was using before where a  
21 class member has taken a nonforfeiture option and retained a  
22 policy benefit, paid-up benefit of \$30,000, in the settlement,  
23 they can elect to have that benefit doubled.

24 THE COURT: But they have no damages.

25 MR. PENNY: I'm sorry?

1 THE COURT: They get no damages.

2 MR. PENNY: Right. There would be no cash damages  
3 payment for that option. Your Honor should know that there are  
4 17,000 class members that have already elected a nonforfeiture  
5 option before this settlement arrived. For those class  
6 members, the benefit of this settlement is that it will double  
7 their current paid-up benefits.

8 The class -- I'm sorry. The 17,000 policyholders  
9 that are in that situation have an average paid-up benefit  
10 currently of \$28,000. By clicking a box and signing a form in  
11 the settlement, they can have the value of those policies  
12 doubled to 56,000. For those 17,000 class members alone, that  
13 amounts to an additional \$475 million in coverage benefits.

14 THE CLERK: Judge, if I may interrupt, I just  
15 admitted a Leslie Tick who is a new participant in Zoom.

16 THE COURT: All right, is this Ms. Tick, Mr. Tick,  
17 what? Is it Mr. Tick or Ms. Tick so I know how to address  
18 them?

19 THE CLERK: I've asked them to unmute themselves so  
20 they're able to speak.

21 MS. TICK: It's Ms. Tick, T-i-c-k.

22 THE COURT: Are you a class member?

23 MS. TICK: No, I'm not. I'm just observing.

24 THE COURT: And what is your interest?

25 MS. TICK: I'm with the California Department of

1 Insurance.

2 THE COURT: All right. And you don't wish to speak?

3 MS. TICK: No, thank you.

4 THE COURT: All right. Let me get this straight.

5 The enhanced policy, option number one, you get an enhanced  
6 paid-up benefit with double the paid-up benefit. You do not  
7 get any monetary damage.

8 MR. PENNY: That is correct, Your Honor.

9 THE COURT: If you choose the nonforfeiture option,  
10 option number one. So far, 17,000 people have elected to take  
11 that benefit.

12 MR. PENNY: Well, they have elected the nonforfeiture  
13 option before the settlement arrived for all sorts of different  
14 reasons. They decided they couldn't pay the premiums or  
15 whatever it was.

16 THE COURT: All right. And that average -- so this  
17 was just under the contract.

18 MR. PENNY: Correct, Your Honor.

19 THE COURT: And you are using this to show what a  
20 valuable thing this option is.

21 MR. PENNY: Especially for those 17,000 class members  
22 who currently have just the \$28,000 in benefits. The value of  
23 this settlement for them is they will double that, and that  
24 option is not just available to those 17,000. It's available  
25 to the entire class. I mean, anybody can take advantage of

1       that if they like it.

2               THE COURT: Are you telling me that 17,000 times  
3       56,000 is 475 million?

4               MR. PENNY: No, because that would be double counting  
5       the benefits. The additional benefit is the additional \$28,000  
6       in coverage each of the 17,000 class members would obtain.  
7       That's 475 million.

8               THE COURT: All right. And that's just illustrative  
9       of what has happened apart from the settlement. So we can  
10      expect -- the next part of that would be, I guess, an  
11      explanation of what might happen in the settlement?

12              MR. PENNY: Yes, Your Honor. I mean, in the  
13      settlement for that first option one, all of those 17,000  
14      people, they have the two options in option one. Option one is  
15      either \$1,000 payment or the double paid-up benefits. I talked  
16      to hundreds of people who have a nonforfeiture option already.  
17      Every single one of them told me they value the double paid-up  
18      benefit far greater.

19              So my expectation is every one of those 17,000 people  
20      but a couple of people who things get lost in the mail are  
21      going to elect to double their benefit, and when they do that,  
22      that will result in an almost half a billion dollars in  
23      additional coverage just for that one small segment of the  
24      class on that one election option alone.

25              THE COURT: Well, suppose all 207,000 -- I guess we

1 take away 17,000 and call it 185,000. Suppose 185,000  
2 policyholders all exercise the nonforfeiture option. Do you  
3 have any figures as to what value that would be?

4 MR. PENNY: I don't, Your Honor. I don't have that  
5 number. It's an enormous number.

6 THE COURT: I guess it is, and the question is, can  
7 Genworth pay it.

8 MR. PENNY: Well, it's an --

9 THE COURT: I know they're not going to pay it out of  
10 pocket, but they're going to have to pay it as it goes along.  
11 Has anybody analyzed that if everybody took that option, what  
12 would happen to the company going forward and whether or not it  
13 would end up folding or claiming protection under Chapter 11 or  
14 whatever insurance companies do, receiverships?

15 MR. PENNY: Practically speaking, Your Honor, I think  
16 you have to understand that Genworth has billions and billions  
17 and billions of dollars set aside in their reserves to pay the  
18 claims in those choice one policies and other policies, and the  
19 practical effect is, if everybody in the class selected the  
20 double paid-up benefit, even though Genworth wouldn't be  
21 getting any more premiums, their current reserve pool, my  
22 estimated guess is, would actually be in much better shape --

23 THE COURT: How many billions do they have in  
24 reserve?

25 MR. PENNY: I think it's billions, not millions.

1 THE COURT: I meant billions. I tried to say it.  
2 How many billions do they have in reserve?

3 MR. PENNY: I believe it's somewhere north of 9-,  
4 maybe north of \$10 billion --

5 THE COURT: Then what would happen in that event,  
6 there would be no -- there wouldn't be any money that would  
7 come out of that. The claims would accrue over time, and, in  
8 the meantime, Genworth would have the use to invest the \$10  
9 billion -- 9 billion, \$10 billion and increase the reserves or  
10 pay them out to the company.

11 So the question I have is, what happens if everybody  
12 elects -- if there's a substantial election here, what happens  
13 to the reserves money? Does it continue to accrue and increase  
14 the value of the reserve, or does it generate an income that is  
15 then spun off to the company?

16 MR. PENNY: The way I understand it, and, again, this  
17 is probably more in Genworth's expertise than my own.

18 THE COURT: I'll get him to answer it. You tell me  
19 what you think.

20 MR. PENNY: The way I understand it is as the  
21 claim -- the money that is set aside in reserves is invested in  
22 some very conservative manner which is part of the reason why  
23 its interest rates have retained almost historic low levels for  
24 20 years. The reserve pool hasn't grown as much as was  
25 anticipated, but, in any event, the money in the reserve pool

1 would continue to grow, and it could not be released from the  
2 reserves unless Genworth could demonstrate to its regulating  
3 entities that it was more than adequately reserved for all the  
4 policies that they were protecting, and then I suppose  
5 surpluses could be removed from those reserves, but that would  
6 all happen under the auspices of regulators.

7 THE COURT: Of the state regulators.

8 MR. PENNY: Right.

9 THE COURT: Go ahead.

10 MR. PENNY: So now that we tackled the enhanced  
11 paid-up benefits, option one, I'd like to return to our  
12 exploration of the other options. We had already --

13 THE COURT: Are you finished with option two?

14 MR. PENNY: Yes, we're finished with option two.  
15 Option three is the next one that provides a cash damages  
16 payment, and it also provides for reduced premium going forward  
17 and reduced benefits, of course. Option three removes the  
18 inflation benefits.

19 The average cash payment for option three is \$4,677.  
20 The average premium reduction would be \$1,169.25. Just to put  
21 that in perspective, the average premium payment for a class  
22 member in 2018 was around \$2,600. So we're talking about a  
23 very substantial reduction in the premium payment alone.

24 Again, this settlement is offering people not just  
25 cash damages payments but ways to modify and regulate the



1 premium increases that they're going to be told about in the  
2 future. So substantial cash damages payments, substantial  
3 reduction of premium for option three. Option four --

4 THE COURT: How much are the benefits reduced?

5 MR. PENNY: Well, the benefits are reduced by  
6 removing the inflation protection which means that the daily  
7 benefit maximums and the lifetime maximum, if it's an unlimited  
8 policy, would be reduced back to their original levels.

9 THE COURT: In other words, it's a retroactive  
10 removing of the inflation factor?

11 MR. PENNY: Exactly.

12 THE COURT: Not a removal of the inflation factor as  
13 applied to date. So if I got a policy -- when were the first  
14 of these policies issued that are in the class?

15 MR. PENNY: Early 2000s, Your Honor.

16 THE COURT: Let's just say 2002 I got a policy, and  
17 all of the inflation adjustment has been made, and, as a  
18 result, my policy has increased by -- the benefit has increased  
19 by, let's say, 1.5 percent a year. All of that inflation under  
20 this settlement adjustment is wiped out, and I'm back to my  
21 original benefit at 2002; is that correct?

22 MR. PENNY: That's essentially correct -- yes, Your  
23 Honor.

24 THE COURT: And I keep the policy I bought in 2002  
25 but have a reduced payment. My payment is reduced by \$1,169 a

1 month --

2 MR. PENNY: 25 cents.

3 THE COURT: A year?

4 MR. PENNY: Per year, yes.

5 THE COURT: And I also get \$4,677.

6 MR. PENNY: That's correct, Your Honor. So option  
7 four removes the inflation benefit, but it only reduces the  
8 accrued benefits by 25 percent. So you don't go all the way  
9 back to the initial policy limits. You just reduce your  
10 current benefits by 25 percent.

11 THE COURT: And is there a cash payment?

12 MR. PENNY: Yes. The cash payment is \$1,650, and the  
13 average premium reduction is \$412.50 per year.

14 THE COURT: All right.

15 MR. PENNY: Now, option five would reduce an  
16 unlimited term policy to a six-year term policy. You still  
17 maintain --

18 THE COURT: It applies only to unlimited term  
19 policies.

20 MR. PENNY: Or it could take your term from five  
21 years to four years, four years to three years, etcetera, but  
22 for unlimited, it rachets it back to six years.

23 THE COURT: What if I have a five-year term? What  
24 does it do?

25 MR. PENNY: Then you go to a four-year term.

1 THE COURT: And it goes down, four goes to three,  
2 three to a two, and a two to a one.

3 MR. PENNY: Exactly.

4 THE COURT: Is the choice, or is the base comprised  
5 of policies between one- and five-year terms and then it jumps  
6 to unlimited, or is there something between five and unlimited?

7 MR. PENNY: No, I don't think so.

8 THE COURT: What's that?

9 MR. PENNY: There's nothing between five and  
10 unlimited.

11 THE COURT: There's nothing between five --

12 MR. DUVALL: I'll try -- I'm sorry to interrupt.

13 THE COURT: It might be a good idea if you come to  
14 lectern so we can all hear you, particularly the people on the  
15 radio, audio.

16 MR. DUVALL: Under this particular option that Mr.  
17 Penny is discussing, the reduction is essentially one level  
18 down. By example, lifetime to six years. The next level down  
19 is a bit of a function of what's available including in that  
20 state or to that policyholder.

21 So Mr. Penny was illustrating perhaps the next level  
22 down from six would be five. It could be four, but the point  
23 is next level down from where the policyholder currently sits.

24 THE COURT: How does unlimited get reduced to the  
25 next level down with the level being six? I would say the

1 unlimited would have something that would be a limit, and then  
2 you'd know what the limit was. Unlimited -- we're talking  
3 about the length of coverage -- right? -- the term?

4 MR. DUVALL: Right.

5 THE COURT: And unlimited means until I die, I guess;  
6 is that right?

7 MR. DUVALL: Right.

8 THE COURT: So what, in the overall scheme of things  
9 apart from this settlement, is the choice that I have after  
10 unlimited -- I don't want unlimited, but I want it a little bit  
11 less. What's my choice?

12 MR. DUVALL: The next level down that's available in  
13 your state.

14 THE COURT: Whatever is available in the state; is  
15 that what you are saying?

16 MR. DUVALL: Right.

17 THE COURT: So there are 50 different choices. So I  
18 could have life less five years, or I could choose a term of  
19 20 years? What does that mean? I don't understand it.

20 MR. DUVALL: I don't know that there are 50 different  
21 choices, Your Honor. I do know that six years is, I guess I  
22 could say, a relatively frequent term that is used. So that's  
23 probably the best example, to go from lifetime to six.

24 THE COURT: When you all were negotiating this, did  
25 you look at what the choices were in the various states,

1 whether or not -- how realistic is it that a state regulator  
2 would look at this settlement and say, this is not a fair  
3 settlement, this option isn't, to people in my state because if  
4 they go from unlimited, then they would go to ten years or  
5 12 years or something instead of going all the way down to six?

6 MR. DUVALL: Well, we considered -- the point of this  
7 settlement, Your Honor, is to allow policyholders essentially  
8 the new opportunity, based on additional information, to make a  
9 choice to reduce or to stop paying their premiums.

10 THE COURT: But I'm an affluent person. Let's just  
11 assume that. That's not true, but let's assume it. And I want  
12 unlimited care. I really want that, and I can afford it. Now  
13 you're telling me that the unlimited option is going to drop,  
14 and I'm not going to be able to have that. No?

15 MR. DUVALL: You can keep that policy.

16 THE COURT: As long as I pay for it out of my  
17 affluent resources.

18 MR. DUVALL: That's right.

19 THE COURT: So what happens in this policy, you said  
20 the term goes from life to six years, and then it goes down one  
21 level depending on the state's regulation. But do I keep the  
22 policy I have in terms of the kind of benefits that it  
23 provides?

24 MR. PENNY: You will keep -- the other adjustment is,  
25 you will revert your five percent compound interest accruals to

1 their original policy term, but you will then keep the five  
2 percent interest going forward. So it's like a step back on  
3 the daily benefit maximums, but they can start growing again  
4 under this policy.

5 THE COURT: I bet if I could be admitted to Phi Beta  
6 Kappa status, I might understand that, but I'm not, and I  
7 don't. Can you help me again?

8 MR. PENNY: Sorry, Your Honor. For example, looking  
9 at the daily benefit maximum, let's say that was \$250 when the  
10 policy was purchased 12 years ago, and it has, with the benefit  
11 of compound interest inflation protection, grown to \$350.

12 Under this option, you will reduce the term of the  
13 contract from unlimited down to, like, six years, and you will  
14 reduce your daily benefit maximum from 340 or \$-50 down to the  
15 \$250.

16 THE COURT: In other words, you eliminate the  
17 inflation protection that you've achieved so far.

18 MR. PENNY: That you've achieved so far, but then it  
19 will start growing again. You still have the five percent  
20 inflation protection.

21 THE COURT: All right.

22 MR. PENNY: And an important point was made by Mr.  
23 Duvall just as he left which is none of these changes or option  
24 elections are compulsory. Every single class member can keep  
25 their existing policy if they want to. The settlement is

1 offering more information and options for people who need to  
2 make changes to their policy. The average cash payment for  
3 that option, option five, \$4,187, and the average premium  
4 reduction is \$1,046.75.

5 THE COURT: 1,000 what?

6 MR. PENNY: \$1,046.76. So now that we've established  
7 what the average cash damages payments are for each of those  
8 four options, we can consult Genworth's historic claims  
9 election data to get a sense for what class member elections  
10 might be made in this settlement.

11 In the past, when faced with rate increase actions or  
12 others, policyholders, 20 percent of the class have elected  
13 some of these reduced benefit options. Those are the ones with  
14 the cash damages payments. Five percent have elected the  
15 nonforfeiture options.

16 If we apply those same presumptions to elections that  
17 would be made in the settlement, and, again, the options in the  
18 settlement have cash damages payments and enhanced -- things  
19 that were never offered in the past, so I think that alone  
20 makes it conservative, but if they elect at the same levels,  
21 that results in aggregate cash payments of \$218,000,224 --  
22 sorry, let me start over. \$218,224,100. If we want to be --

23 THE COURT: Wait a minute.

24 MR. PENNY: Sorry.

25 THE COURT: So we've gotten 25 percent of the

1 customer base there. Have the other 75 percent kept their  
2 policies and paid the premiums?

3 MR. PENNY: Yes, Your Honor.

4 THE COURT: So if the election rate is the same as --  
5 what period is this?

6 MR. PENNY: This is the period of about 2012 to 2018,  
7 I believe.

8 THE COURT: But won't the election rate be higher now  
9 that the disclosures are more full?

10 MR. PENNY: I expect it would be which is why I think  
11 this is a conservative estimate, and just to tie this back to  
12 the brief that we submitted, we submitted an even more  
13 conservative estimate where we assumed that only half as many  
14 class members would elect the benefits in the settlement, and  
15 that's where we arrived at that \$100 million number. In fact,  
16 it is \$109,122,355.

17 I think this settlement will outperform those  
18 conservative estimates. Part of that is based on the fact that  
19 as policy premium rates have continued to escalate over the  
20 years, more and more of the class members that haven't yet  
21 elected any of those options are getting to a stress point  
22 where they are getting -- where the premiums are becoming  
23 either unaffordable for them or they don't value the full  
24 benefits in light of the new premiums. And so I think a lot of  
25 people will be taking advantage of the options in this



1 settlement to make those adjustments with the benefit of full  
2 information and getting some pretty substantial cash damages  
3 awards to boot.

4           The other reason I think that this -- these estimates  
5 are conservative is based on my conversations with hundreds and  
6 hundreds of class members and my co-counsel's conversations  
7 with thousands of others. Oftentimes in a settlement, the only  
8 information we have about the class's reaction to it are the  
9 objections that are lodged, because the approval process  
10 doesn't have a mechanism to capture the positive reaction of  
11 the class.

12           Here, we actually have a lot of data from the other  
13 class members that have not objected. I have spoken to over  
14 500 class members, in depth conversations. I was almost on the  
15 phone all day for over a month. My co-counsel did the same  
16 thing. Collectively, we've spoken to well over 4,000 members  
17 of the class.

18           These people, the vast, vast majority of the people I  
19 spoke to embraced this settlement, and they're excited about  
20 it. Many of them went out of their way to thank the named  
21 plaintiffs for bringing the lawsuit and thank class counsel for  
22 their work on this. They're excited about their benefits, and  
23 they're concerned about any delay that might result.

24           One anecdote to offer Your Honor on that is I don't  
25 know if you noticed, but at Friday's hearing, there was a woman

1 who was sitting at the back -- there she is, Ms. Masters. I  
2 didn't even notice she was there. Ms. Masters was unknown to  
3 class counsel before the hearing, but she stopped Mr. Davidson  
4 in the hall, had some questions about the settlement, and Mr.  
5 Davidson answered them. Is it okay if I read the email that  
6 you sent to Mr. Davidson?

7 MS. MASTERS: Sure.

8 MR. PENNY: That evening, Ms. Masters wrote Mr.  
9 Davidson an email where she said, "Stuart, thank you again for  
10 taking the time to precisely explain the information I was  
11 looking for. I hope the final verdict was in our favor as many  
12 people like myself are relying on a good outcome. If you can  
13 give me any brief information on the judge's opinion, I would  
14 love to hear it. However, I realize that it might be  
15 confidential and that I'll have to wait for my letter. Best  
16 regards, Jean Masters."

17 Ms. Masters' comments echo those of hundreds of other  
18 class members. When I got back to my house on Friday evening,  
19 I had phone messages from nine other class members who were  
20 anxious to find out how the hearing went, and, over the  
21 weekend, 43 more called me.

22 The class is anxious for the settlement. The class  
23 is really hoping for -- the vast majority of the class is  
24 really hoping that this settlement is approved and that they  
25 have the opportunity to take advantage of its benefits, and I

1 didn't want their voices to go unheard.

2 Your Honor, I think now I'd like to move on to Mr.  
3 Jacobs' objection pretty much where we left off on Friday's  
4 hearing unless you have any other questions about some of the  
5 material we just went through.

6 THE COURT: No, I'm fine with it so far.

7 THE CLERK: If I may interrupt, I just admitted  
8 Gregory Karawan into the Zoom meeting.

9 THE COURT: How do you spell his name?

10 THE CLERK: K-a-r-a-w-a-n. Gregory Karawan.

11 THE COURT: Mr. Karawan, are you a class member or --

12 MR. KARAWAN: Good morning, Your Honor. No, I am  
13 in-house counsel at Genworth Financial.

14 THE COURT: Is any legal work being done at Genworth?

15 MR. KARAWAN: I'm multitasking, Your Honor.

16 THE COURT: You know what? I don't think I'd say  
17 that. Every time there's a lawyer who multitasks, you take on  
18 risk that you're doing one of them wrong.

19 MR. KARAWAN: Fair enough.

20 THE COURT: All right. Now we're going back to Mr.  
21 Jacobs' objection.

22 MR. PENNY: Right. Your Honor, just to set the table  
23 on Mr. Jacobs' objection, or at least the one that I'm going to  
24 address first, it seemed to us pretty clear that the premise  
25 of his objection is that there are this subclass, as he calls

1     them, of gold class policyholders that have the same rich  
2     benefits he does and that he thinks that he was disadvantaged  
3     by not getting the disclosures sooner, like in 2014, because he  
4     could have then gone to the market and found a better policy.

5             And he challenged the parties in this case to be more  
6     creative in our settlement and create an option for him and  
7     others that would basically create an entirely new policy based  
8     on competitive market rates at the time. I think I've fairly  
9     summarized that part of his objection --

10            THE COURT: Excuse me a minute. His objection is  
11     which number?

12            MR. PENNY: 159, Your Honor.

13            THE COURT: Just a minute. Let me get to it. Mr.  
14     Jacobs, did he fairly characterize your objection, sir?

15            MR. JACOBS: No, Your Honor. Along with so many --  
16     God, you can't believe what's going on here.

17            THE COURT: Mr. Jacobs, we can't hear you -- we can't  
18     hear you. Turn the volume up.

19            MR. JACOBS: Can you hear me now?

20            THE COURT: Not much better.

21            MR. JACOBS: Not much better?

22            THE COURT: That's better now. Talk slowly. Very  
23     succinctly, tell me what your objection is, and tell Mr. Penny  
24     what it is that you say.

25            MR. JACOBS: Specifically to this, I say that -- to

1 this particular part of the objection, I say that we could have  
2 gone to market and looked for more competitive rates, but we're  
3 not expecting to have 2014 rates now. It's just that the  
4 policies that we could have had would have been lower than  
5 Genworth, and today we'd be sitting with that.

6 Today we can't go out to the market because of my  
7 physical issues. I don't qualify. And they're trying to  
8 reduce our benefits from unlimited down to as low as five  
9 months, Your Honor. Option one and option two, based on his  
10 averages, allow for five months' coverage. If people buy into  
11 option one or option two, they will get five months' coverage  
12 before their policy ends. So that doesn't make sense for  
13 somebody that was looking for unlimited. I mean, that's very  
14 significant. They failed to point that out.

15 The other thing is that the six years is now based  
16 on, instead of the current amount that we would be getting of a  
17 maximum benefit of \$343, it's going down to \$257 which is  
18 two-thirds of what the normal price for healthcare care in a  
19 home is today. So they're eliminating that.

20 They have just -- I have read the statement -- the  
21 other thing is, Your Honor, that's really -- it's almost  
22 irrelevant what he just went through because -- let me just  
23 read this California assessment of what they did not do, what  
24 they should have done. Plaintiffs do not provide an assessment

25 --

1           THE COURT: Wait just a minute. Is any of that in  
2 your objection?

3           MR. JACOBS: Any of which part?

4           THE COURT: Any of what you are saying -- I can't  
5 find any of it in document number one --

6           MR. JACOBS: Which part are you referring to? Most  
7 of it is in my objection letter, yes.

8           THE COURT: When you finish talking, I'll talk. You  
9 tell me when you're finished. Now, don't talk --

10          MR. JACOBS: I don't --

11          THE COURT: Enough. Don't say another word until I  
12 talk and then I'll give you a chance, because the court  
13 reporter needs to get us both. Are the points you are making  
14 now anywhere in your written objection? If so, where?

15          MR. JACOBS: The points that I'm making -- are you  
16 referring to that -- sure, let me do it. The policy  
17 includes --

18          THE COURT: Don't talk until you've got your thoughts  
19 together. That way the court reporter won't be taking down a  
20 stream-of-consciousness discussion as you work yourself through  
21 the document which all of us do from time to time, but it's not  
22 helpful.

23          MR. JACOBS: Okay. Our main claim is in the  
24 objection statement that we cannot go out into the marketplace  
25 now to find a new policy, and they deceived us in 2014. If we

1 knew about this price increases in 2014, we could have looked  
2 at options. Now, we can't, and they are moving up to \$27,000.  
3 It's objection number one that -- in my objection letter that  
4 this is all referred to.

5 THE COURT: All right. Thank you.

6 MR. PENNY: So I just want to make the point --

7 MR. JACOBS: I'm not quite finished.

8 MR. PENNY: Oh, Saul.

9 MR. JACOBS: Your Honor, it's real important that  
10 this -- this is not in my complaint because this is as a result  
11 of an answer to their objection --

12 THE COURT: Mr. Jacobs, this is not the time for you  
13 to do that.

14 MR. JACOBS: Okay, I'm sorry.

15 THE COURT: It's time for him to talk, and if he says  
16 something else, at the end I'll give you a chance. But you are  
17 confined right now to what you've said in your original  
18 presentation and in this letter. Mr. Penny now has the time to  
19 address what you've said, and if you have something else at the  
20 end, I will entertain it at that time. Now we're not going to  
21 deal with new points. All right, Mr. Penny.

22 MR. PENNY: Thank you, Your Honor.

23 MR. JACOBS: I'm grateful for that. Thank you.

24 MR. PENNY: I think it should be clear to Mr. Jacobs,  
25 but in case it is not, we are not changing any of the terms of

1 his policy. Nothing happens automatically in this settlement.  
2 This is information and options to Mr. Jacobs and every other  
3 class member. They are far better off with this settlement  
4 than without it even if they don't elect the options, and this  
5 settlement is not harming anybody in any way.

6 And if Mr. Jacobs doesn't see any value in this  
7 settlement, then what he should have done was opt out. If he  
8 thinks he has another more valuable claim, he should have opted  
9 out. I know the opt-out objection deadline is past, but I'd be  
10 surprised if Genworth wouldn't let him opt out right now  
11 because his claims have no merit. There's nothing to be  
12 concerned about.

13 Here's the thing: Mr. Jacobs' entire document is  
14 based on the notion that he could have gone to the market in  
15 2014 and gotten a better deal and that he would have done that  
16 if he had been given the disclosures earlier.

17 He's the objector, and it is his burden to establish  
18 that there was a better deal to be had. He has not offered  
19 anything, I mean honestly, anything to support that notion, and  
20 it is a complete and entire fiction to boot.

21 THE COURT: Look, let's understand something.  
22 There's no need to get exorcised about all this. You can say  
23 it. This isn't an attack on Mr. Jacobs, but I want you to say  
24 it all directly. Just don't get so excited, and then he won't  
25 get so excited.



1 MR. PENNY: You're right. Thank you, Your Honor.

2 THE COURT: Kind of back off a little bit, and I  
3 understand the point is it is his job to have put in his  
4 objection some proof that he could actually have gotten  
5 something in 2014 that would have been better, and if he  
6 doesn't do that, then that objection fails; right? That's your  
7 point?

8 MR. PENNY: That's correct, Your Honor.

9 THE COURT: He hasn't done it, so you say it has  
10 failed on that point. All right, go ahead. Anything else?

11 MR. PENNY: Yes, Your Honor. What I was just going  
12 to say is I think Genworth has a more detailed presentation on  
13 this point, but had Mr. Jacobs gone to the market in 2014, what  
14 he would have found were no other unlimited policies to pick  
15 from and limited policies that would have cost three or four or  
16 even more times as much as his current Genworth policy. So not  
17 only has he not supported it, the reality is that there was no  
18 better deal to be had anywhere else.

19 THE COURT: Excuse me. Do you have proof of that, or  
20 did you tell me Genworth is going to put that on?

21 MR. PENNY: I'm just previewing it, Your Honor. I  
22 believe Genworth has more details on that fact.

23 THE COURT: I'll let them speak. They have a right  
24 to speak, but I understand. Now, what else -- his other  
25 objection is different than that. The second objection which

1 he hasn't said much about in his statement or orally was that  
2 the settlement sheet and full settlement document are unclear  
3 and complicated such that it is impossible to make a rational  
4 decision regarding proposed settlement options.

5 MR. PENNY: Your Honor, the point there is that  
6 nobody is being asked to make an election option under the  
7 settlement until the special election letter arrives at which  
8 point they will have full and complete information to inform  
9 that decision, and that's a very important part of this  
10 process.

11 I think Your Honor should understand that in most  
12 class action settlements, class members are asked not only to  
13 opt out and object but have to actually file their claim forms  
14 making their benefit elections before final approval.

15 And, in most instances, it is impossible to tell the  
16 class member exactly what the value of those options will be  
17 until final approval is granted and the claims administration  
18 process ensues.

19 The *Lumber Liquidators* case is a perfect example of  
20 this. That's a case that was approved in this district, and  
21 the approval of the settlement was affirmed by the Fourth  
22 Circuit. The situation in *Lumber Liquidators* was before final  
23 approval and before the opt-out and objection deadline, class  
24 members had to elect their remedy. They had to say either I  
25 want the cash damages in the settlement or I want the vouchers,

1 the coupons in the settlement, and they were just given  
2 estimates of what the value of each of those would be.

3 Because so many people ended up taking the cash value  
4 payment, that payment was actually worth less than 25 percent  
5 of the projected -- the low end of the projected value, and  
6 even in that instance the Fourth Circuit had absolutely no  
7 problem affirming approval of the settlement even though the  
8 class members had to make those elections without complete  
9 information.

10 THE COURT: I'm not sure I follow the point on *Lumber*  
11 *Liquidators*. You said they didn't know -- they had to make  
12 their election before final approval but that after the  
13 elections were made, the cash payment was a lot less than they  
14 thought. Was the cash payment actually made before final  
15 approval?

16 MR. PENNY: No, Your Honor.

17 THE COURT: No, and was there a hearing after the  
18 final approval to figure out what the cash payment was?

19 MR. PENNY: So at final approval --

20 THE COURT: In other words, how do you know that the  
21 cash payment was a lot less other than outside the record in  
22 the *Lumber Liquidators* case?

23 MR. PENNY: That's an important point, Your Honor.  
24 Let me make it clear. The opt-out and objection deadline and  
25 the claims filing deadline were months before final approval.

1 When the parties came before this district court, not Your  
2 Honor but a different court, they had the information from the  
3 claims process where before the final approval was made, it was  
4 known that even though class members had been told that the  
5 cash damages awards would be estimated to be between 25 and  
6 40 percent of the purchase price of the flooring --

7 THE COURT: Of the what?

8 MR. PENNY: Of the flooring. So the Court knew that  
9 class members were told that the estimate would be 25 to  
10 40 percent of the purchase price, and, in the end, what they're  
11 actually going to get in the settlement is more like five  
12 percent. The Court knew all of that and granted final  
13 approval, and the final approval was approved by the Fourth  
14 Circuit.

15 The point of that is that it is impractical in many  
16 instances to give complete and 100 percent accurate data to  
17 class members before final approval because you won't know what  
18 some of those options look like until a later point in time.

19 THE COURT: But *Lumber Liquidators*, they actually did  
20 know what that was before final approval. In *Lumber*  
21 *Liquidators*, they didn't have that information, what the cash  
22 value would be as opposed to the value of the voucher at the  
23 time they had to make the election.

24 MR. PENNY: Right.

25 THE COURT: That's a different circumstance than

1 here.

2 MR. PENNY: Right, and that's what makes this  
3 settlement actually much better than *Lumber Liquidators*.  
4 Again, the point of this whole example of *Lumber Liquidators* is  
5 that the class members had to make these decisions, whether to  
6 opt out, object to the settlement, and had to make the decision  
7 of what benefits they wanted without knowing the precise  
8 contours of what those elections would mean. Then final  
9 approval came, and it was granted.

10 Here, the only options that have to be elected are  
11 whether to opt out or object to the settlement, and the notice  
12 plan gives a great amount of detail to class members on what  
13 these election options will look like. It gives them the  
14 notice which describes them. It created a website in which all  
15 the documents necessary to appreciate the settlement were  
16 listed on. It had phone numbers for the claims administrator,  
17 and, most importantly, for anybody who still wanted more  
18 information, they could talk to class counsel directly, and as  
19 I mentioned before, well over 4,000 class members did exactly  
20 that and had their questions answered directly. All the  
21 information was available to the class.

22 THE COURT: And that takes care of number two. The  
23 third one is Mr. and Ms. Skochin did not have the best interest  
24 at heart in representing the overall class and gold subclass.

25 MR. PENNY: This one, quite frankly, Your Honor --

1 THE COURT: Mr. and Mrs. Skochin, if I recall  
2 correctly, actually had what Mr. Jacobs calls a gold policy; is  
3 that right?

4 MR. PENNY: They had what Mr. Jacobs calls a gold  
5 policy, and they are one of about 40 percent of gold class  
6 policyholders who have, over the years, elected to reduce their  
7 coverage.

8 THE COURT: Right.

9 MR. PENNY: What the Skochins did, and this is in  
10 every single complaint we alleged, they elected the  
11 nonforfeiture option in 2018. They would have done that years  
12 earlier had they been given the disclosures sooner. To make  
13 them or to give them benefits in the settlement along with the  
14 17,000 other people who did the same thing, they are getting  
15 double the paid-up benefits that they would have had before.  
16 It's not complete relief, but it's satisfactory relief --

17 THE COURT: The bottom line of his objection is that  
18 Skochins get no benefit out of the settlement other than the  
19 class representation payment of \$25,000 each, so a total of  
20 \$50,000 and that that's -- the class members, therefore,  
21 don't -- the class representatives don't adequately represent  
22 the class. That's the objection. So what do you have to say  
23 about that?

24 MR. PENNY: He's wrong. The Skochins are getting  
25 value in this settlement. It's value that makes sense and is

1 commensurate with their claims.

2 THE COURT: What value are they getting?

3 MR. PENNY: They're getting the double the paid-up  
4 benefits of their policies. That's very good relief.

5 THE COURT: Do you know what that is?

6 MR. PENNY: Well, the average was 28,000 per class  
7 member. They are right in that ballpark. I don't know exactly  
8 what it is.

9 THE COURT: And they get double that.

10 MR. PENNY: They get double that. That's the same  
11 relief that is offered to every single class member in this  
12 lawsuit. If they want it, they can do exactly what the  
13 Skochins are doing and get what the Skochins consider to be  
14 valuable paid-up benefits.

15 I just showed Your Honor at the beginning of the  
16 hearing, in the aggregate for just 17,000 class members who  
17 already decided to take an NFO benefit, they are getting  
18 collectively almost half a billion dollars in additional  
19 coverage as a result of this lawsuit.

20 THE COURT: All right, very quickly, then the  
21 attorneys' fees relative to the awards are exorbitant, conflict  
22 of interest exists. I don't understand exactly what the  
23 conflict is. Can you help me with your understanding of it?

24 MR. PENNY: I think what he means by conflict is,  
25 again, he thinks that the Skochins and class counsel and

1 everybody involved on our side sold -- I think he said sold  
2 them down the proverbial river by settling a case where he  
3 thinks people get no benefits but where I think I showed Your  
4 Honor there are substantial benefits.

5 THE COURT: He says essentially that your claim for  
6 attorneys' fees, if you get the \$24 million, which is  
7 15 percent on the cash payment aspect of the settlement, that  
8 you will be getting the equivalent of \$500 an hour times  
9 50,000 hours, and you spent nowhere 50,000 hours on the case  
10 and so that's exorbitant. So what's wrong with that argument?

11 MR. PENNY: With all due respect to Mr. Jacobs, it  
12 does not reflect the way class counsel's fees are justified and  
13 paid out in these lawsuits. Even when the fees are coming out  
14 of a portion of the class's relief, you are still looking at  
15 lodestar multiples. You are not talking about giving class  
16 counsel just their hourly rates. I mean, we work on a  
17 contingency-fee basis. While this case might have been a good  
18 result, dozens of others are not good results.

19 THE COURT: He is correct that we are to look at the  
20 lodestar calculation method in assessing whether or not the  
21 contingent fee is reasonable. The best thing to do is address  
22 that when we talk about attorneys' fees.

23 MR. PENNY: Fair enough.

24 THE COURT: All right.

25 MR. PENNY: The only other point --



1 THE COURT: Go ahead.

2 MR. PENNY: I don't know if this is an important  
3 point for the Court or not, but I think it's important.  
4 Mr. Jacobs' objections is really based on his own personal  
5 circumstances. He pretends or he thinks that he's speaking on  
6 behalf of everybody else who has these gold class policies, but  
7 what he doesn't appreciate --

8 THE COURT: How many gold class policy owners  
9 objected?

10 MR. PENNY: That's a good question, Your Honor. I  
11 believe it was ten objections filed by 13 class members had  
12 gold class policies, but I think if you survey those, they're  
13 objecting on all sorts of different bases. Not many of them  
14 are objecting on the basis that Mr. Jacobs is, and Mr. Ferrara  
15 is also included in that class.

16 THE COURT: Do you have the numbers of those, the ECF  
17 numbers of those objections? Maybe you can get them --

18 MR. PENNY: I could get them for you, Your Honor.

19 THE COURT: Maybe you can get them at the break which  
20 we will take now for 20 minutes.

21 MR. PENNY: Okay.

22 THE COURT: Ladies and gentlemen who are listening,  
23 as I understand the protocol, they are to stay connected and  
24 then get back in; is that right, Ms. Brown? We'll be back here  
25 in 20 minutes, so mark your clocks.

1 (Recess taken.)

2

3 THE COURT: All right. We are resuming the hearing.  
4 Mr. Penny.

5 MR. PENNY: Thank you, Your Honor. I think that we  
6 had finished up with Mr. Jacobs' objection, and I was getting  
7 ready to move on to Mr. Ferrara. Is that where you think we  
8 are, too?

9 THE COURT: It is. The only thing I can say is I can  
10 also take this opportunity to let Genworth address Mr. Jacobs'  
11 objection so it's all in one place, and then he can have the  
12 time to respond to both of you. Would you like to do that?

13 MR. PENNY: I think that makes sense, Your Honor.

14 THE COURT: Of course, if you have anything to say  
15 about the value points that Mr. Penny made, now might be a  
16 decent time to say that, too. Otherwise, you can just agree to  
17 them or whatever you want to do.

18 MR. DUVALL: Thank you, Your Honor. On the value  
19 points, I do echo, Genworth does echo what Mr. Penny presented.  
20 And just, in short, this case was about providing policyholders  
21 with additional information and allowing them the choice to do  
22 something with their policies, to reduce or stop paying their  
23 premiums with that additional information.

24 That's what the settlement provides, and Mr. Penny  
25 nicely outlined some of the specific illustrations under

1 certain of those options, how those could work out in terms of  
2 cash to the class members, in terms of additional benefits to  
3 the class members in addition to that information in that  
4 choice.

5 With respect to Mr. Jacobs' objection, as Mr. Penny  
6 said and Genworth agrees, what Mr. Jacobs' objection boils down  
7 to is that for his individual circumstance, he wants some  
8 better relief, better relief than he could ever obtain in a  
9 lawsuit against the company, by the way, than this class  
10 settlement supposedly provides for him.

11 That is the stuff of an opt-out, and Genworth would  
12 and does here, in open court, stipulates that if Mr. Jacobs  
13 wants to opt out and sue for some sort of better relief that he  
14 thinks he can get, then he is free to do so, but that is not  
15 the stuff of an objection.

16 THE COURT: May I make -- ask this question? If we,  
17 on your agreement and Mr. Penny's, extend Mr. Jacobs an  
18 opportunity to opt out, do we not have to extend that same  
19 opportunity to all other class members given that there has  
20 been all this briefing and argument and refining and adding to  
21 information available to people? Would I have to do that? I  
22 have never really come across that, and I'm sure you all have,  
23 and can I do that? Is that possible?

24 MR. DUVALL: The answer to your question, Your Honor,  
25 is no, that's not something that needs to be extended here, and

1 the reason for that -- my point is that -- what Mr. Jacobs is  
2 raising is not actually an objection. He's saying, I want  
3 something more or different for myself, for me, personally,  
4 than is being made available to the settlement class. And I'll  
5 talk about in just a moment the lack of foundation he has for  
6 that.

7 But if that's his objection, I guess my primary point  
8 is the objection should be overruled because it's not an  
9 objection to the fairness of the settlement for the settlement  
10 class. He's saying I want something more, I want something  
11 different which, again, he hasn't proven up that he could get  
12 this something more or something different, and if he tried to,  
13 I don't think he would win.

14 But it's -- what he's saying is I want something  
15 better for myself, and I think I can get it. That's the stuff  
16 of an opt-out. That's why we are offering for him -- he's  
17 raising this objection which seems pretty unique to him. So if  
18 he wants to opt out, we stipulate --

19 THE COURT: You are -- at the end of your sentences  
20 you are tending to elide the last couple of words, and I didn't  
21 understand it. Ms. Peterson may have gotten, but I didn't. He  
22 wants to opt out what?

23 MR. DUVALL: If he wanted better relief for himself  
24 uniquely, then he should have opted out. For that reason  
25 alone, his objection should be overruled. To the other, to use

1 his vernacular, gold class members which we're talking about,  
2 unlimited benefits with the inflation protection at five  
3 percent interest over the years, these other policyholders have  
4 not raised Mr. Jacobs' issue. He's raising that solely on his  
5 own.

6 Mr. Penny recounted having spoken to 4,000 class  
7 members who have expressed their support for this settlement.  
8 What Mr. Jacobs is raising is completely unique to him, and so  
9 my primary point is his objection should be overruled on that  
10 basis --

11 THE COURT: Because that is -- essentially the way to  
12 raise that problem is not by objecting to the settlement in  
13 class action litigation but to opt out and proceed separately  
14 to obtain the relief to which you think you are entitled.

15 MR. DUVALL: Thank you for putting it better than I  
16 have. If you'd like, Your Honor --

17 THE COURT: Let's stop just a minute.

18 MR. DUVALL: Sure.

19 THE COURT: Mr. Jacobs, yes or no, would you like  
20 belatedly to opt out and then you can pursue whatever remedy  
21 you want? Do you wish to opt out?

22 MR. JACOBS: I think we should be a class action in  
23 and of ourselves, the 17,000 people that do feel this way.

24 THE COURT: Wait just a minute. I asked you the  
25 simple question to be answered yes or no. Genworth, for whose

1 benefit the opt-out provision ultimately exists, and the  
2 plaintiffs' counsel have both agreed that if you wish to opt  
3 out, you can opt out. They will agree you can opt out, and you  
4 can bring whatever claim that you wish to bring separately for  
5 yourself. Do you want to do that is my question; yes or no?

6 MR. JACOBS: No, if that's my only choice. I think  
7 there's a better choice.

8 THE COURT: The answer is no. That's the answer.  
9 There's no if anything. The answer is no, I don't want to do  
10 that. All right, he doesn't want to opt out, so we'll deal  
11 with it as an objection.

12 Your argument at this point is it's not an objection,  
13 it's an opt-out, he has missed his opportunity to opt out. He  
14 has declined the opportunity to opt out that has been extended  
15 him at this time, and so I need to dismiss the objection as a  
16 -- described as a concealed opt-out issue. Now, the next one  
17 is let's assume there's an objection somewhere --

18 MR. JACOBS: Your Honor -- are you objecting --  
19 what -- did you say you are overruling --

20 THE COURT: I didn't say anything about overruling.

21 MR. JACOBS: I'm sorry.

22 THE COURT: Now, go right ahead, Mr. Duvall, address  
23 it, the next point. I guess it is that he hasn't proved  
24 entitlement to objection because the premise is not -- he  
25 hasn't established that.

1 MR. DUVALL: He has not established the premise of  
2 his objection. Importantly, to get to the bottom of that  
3 premise and whether it were true and if we had facts from him  
4 to prove that would require an individualized determination of  
5 his specific case which is in contrast to what the settlement  
6 class is set up to provide which is the same --

7 THE COURT: Excuse me a minute. What he would have  
8 to prove, you need to define what that is. As I understand it  
9 from Mr. Penny, he would have to offer proof that in 2014,  
10 there was a better option that he now seeks on the market, and  
11 the fact is he hasn't offered that proof. Is that what you are  
12 addressing?

13 MR. DUVALL: I am addressing that.

14 THE COURT: And Mr. Penny also said that you were not  
15 only going to address that, the effect of the absence of proof  
16 on his point, but that you were going to show me that what he  
17 was asserting simply wasn't correct, that there wasn't any such  
18 thing on the market in 2014, I believe, if I understood  
19 Mr. Penny correctly. So, please proceed.

20 MR. DUVALL: Thank you, Your Honor. Mr. Jacobs --  
21 and, actually, just let me make one point to be clear. This, I  
22 guess, second-level response to Mr. Jacobs' objection in  
23 addition to really it's an opt-out in disguise is that the  
24 relief that he is saying he could have gotten, and I'm going to  
25 address why he couldn't have gotten it in just a second, is not

1 relief that we could provide under this settlement anyway. I  
2 just want to make that clear, that I'm not agreeing that this  
3 is relief that he could have gotten, but I'll get back to that  
4 point.

5 As for Your Honor's questions, Mr. Jacobs has offered  
6 no evidence that he, in fact, could have or did go out on the  
7 market in 2014 and find himself a, quote, better policy. I  
8 think he alluded on Friday, and I'll take his illustration or  
9 his reference at face value that he looked at another policy, I  
10 think he said a Mutual of Omaha. We'll call that the silver  
11 policy since he uses the gold policy for Genworth.

12 Why he didn't purchase that silver policy in 2014 and  
13 kept his Genworth policy, I don't actually know because he  
14 didn't put in any evidence of this, but the reason may very  
15 well have been that his Genworth gold policy was a better  
16 policy with better and bigger coverage and, in fact, for a  
17 lower price than that silver policy was out on the market.

18 By the way, we're also assuming that Mr. Jacobs could  
19 have gone out and qualified in 2014 as a matter of underwriting  
20 for a new policy whereas he had already qualified for the  
21 Genworth policy, I believe back in 2003. Examples of that that  
22 would extend beyond Mr. Jacobs, perhaps, or maybe this would  
23 apply to Mr. Jacobs -- again, I don't know -- is did he have a  
24 preexisting condition as of 2014 or any other reason that he  
25 wouldn't have been able to get that silver policy on the



1 market. Those are issues that he's raising of his  
2 individualized causation, his individualized reliance.

3 To the point, Your Honor, that Mr. Penny alluded to  
4 that what if Mr. Jacobs had tried to prove this -- and, by the  
5 way, this goes for Mr. Ferrara as well to a certain extent.  
6 Had Mr. Jacobs tried to go out and replace his, quote, gold  
7 coverage in 2014, it was well established by this time, and  
8 I'll represent to you that Genworth was not selling its gold  
9 policies as of 2014, and other carriers had stopped selling  
10 those policies also.

11 So if we're talking about trying to replace --

12 THE COURT: Do I have anything in the record to prove  
13 that Genworth was not selling its so-called gold policies and  
14 that no one else was selling them?

15 MR. DUVALL: Your Honor, just to be precise here, I  
16 know that Genworth was not selling its gold policies as of  
17 2014. I'm trying to respond to what Mr. Jacobs raised on  
18 Friday and today. I can substantiate that with an appropriate  
19 declaration if needed.

20 I also know that the companies regularly used  
21 business records, and essentially industry research showed that  
22 other carriers had stopped selling those policies as well. I  
23 don't want to overstate it and I say it was every single one of  
24 them, but certainly carriers were -- many carriers had exited  
25 that particular product market, so-called gold policy.

1           So if what we're talking about is Mr. Jacobs now  
2 going out -- this is kind of what he referenced on Friday, was  
3 going out and replacing his gold coverage with silver coverage,  
4 a limited term policy, a six-year term, for example. We did  
5 look into this over the weekend. What Mr. Jacobs, based on our  
6 research -- and, Your Honor, if necessary, I can substantiate  
7 this as needed with a declaration from the company.

8           If he would have replaced his, quote, gold coverage  
9 with silver coverage, something like maybe that Mutual of Omaha  
10 policy that he described, he would have paid at least two and a  
11 half times more for that silver policy and gotten less coverage  
12 than he was paying for and getting with his gold Genworth  
13 policy. That was the reality in 2014.

14           Again, if we were even litigating this, he didn't  
15 submit any evidence, and I'm just adding this --

16           THE COURT: You haven't submitted any either.

17           MR. DUVALL: I can substantiate -- we're just trying  
18 to respond to what he raised primarily orally on Friday, and I  
19 can substantiate that. I do note that the California  
20 Department of Insurance's statement note -- that it has filed  
21 as part of the record noted that Genworth's gold policies have  
22 been, I think it said underpriced, and I think that's a fair  
23 assessment of those, that they have been a tremendous value,  
24 including for class members like Mr. Jacobs.

25           Mr. Penny referenced that the data -- the historical

1 data that Genworth has showing what class members did with  
2 their policies in response to rate increases was that gold  
3 policy members, approximately 40 percent of them, reduced their  
4 benefits in order to reduce or even stop paying their premiums  
5 on these gold policies.

6 Well, 60 percent of them kept the policies, again  
7 because they're a very good value proposition. It's the issue  
8 Your Honor touched on when I was up a little earlier, and under  
9 this settlement, if Mr. Jacobs or Mr. Ferrara, by example,  
10 still want to keep their gold coverage, which they may very  
11 well want to do, and I haven't heard either of them say that  
12 they don't want to keep it or that they can't afford to pay for  
13 it, then that's, perhaps, the election they should make under  
14 this settlement. And they're free to do so. No one is taking  
15 away their coverage.

16 But, again, back to the premise of Mr. Jacobs', and  
17 Mr. Ferrara's to an extent, argument is that the consequence of  
18 this alleged withholding of information by Genworth back in  
19 2014 was that he was somehow prohibited from paying more money  
20 for less coverage earlier. It's just a faulty premise.

21 In any event, back to the point I touched on  
22 hopefully a few moments ago. The design of Mr. Penny and class  
23 counsel's case from the beginning was to put policyholders in  
24 the position that they would have been in had they decided  
25 earlier, based on additional information, to stop or lower

1 their premium payments, and that's exactly what the options  
2 that Mr. Penny thoroughly went through, one, two, three, four,  
3 and five, are designed to do.

4 If a policyholder like Mr. Jacobs looks at that  
5 information and said, you know what, I'd like to reduce my  
6 premium payments, there are five options to do that, two of  
7 which involve not just reducing but stopping the premium  
8 payments, and then the additional components of that, the cash  
9 payments are designed to put that premium money back in their  
10 pockets.

11 And if Mr. Jacobs elects one of those options, and  
12 maybe he'll want to elect option five and take down his policy  
13 to a limited term, and he can take that cash he would have  
14 otherwise been paying to Genworth over the last four years and  
15 do whatever he'd like with it.

16 And Mr. Penny went through some of the average  
17 payments of those special election options, and these are  
18 material cash payments that they can do something with.

19 That would place Mr. Jacobs in the position that he  
20 would have been in had he stopped doing business with Genworth  
21 in 2014. If he had stopped doing business with Genworth in  
22 2014 and gone to this other carrier and started paying more for  
23 less, Genworth wouldn't have made up the difference for his  
24 purchase of another carrier's insurance policy.

25 And that's what I meant earlier when I said that

1 Mr. Jacobs, on the best day of his lawsuit, couldn't recover  
2 any damages from Genworth, at least the consequence that he's  
3 describing. It's inverse harm, if you will.

4 And to the extent he wants Genworth to, as part of  
5 this settlement, create some policy, some gold-plus policy or  
6 maybe a gold policy at a lower rate than the regulators have  
7 approved, we can't do that. We have to charge, if he keeps his  
8 gold policy, the filed and approved rates for these policies.

9 THE COURT: You keep saying that the object of the  
10 suit was to get the disclosures and allow better informed  
11 elections, but the suit also sought damages in the prayer for  
12 relief, page 56, paragraph C. It sought compensatory,  
13 consequential, and general damages in an amount to be  
14 determined at trial.

15 Now, that, to some extent, is in conflict with the  
16 assertion in paragraph 12 which calls for declaratory relief,  
17 injunctive relief, rescission in the event of finding material  
18 misrepresentation, and return of premiums for each year paid,  
19 but that would -- if he had -- so what do you say is the  
20 significance of the paragraph C in the prayer for relief in  
21 respect of the argument you are making?

22 MR. DUVALL: I, of course, invite Mr. Penny to speak  
23 to their own complaint, but I would say, Your Honor, the  
24 significance is it is insignificant. The best statements of  
25 what class counsel were trying to achieve and what the

1 settlement does achieve for this case is as stated, as you  
2 noted, in paragraph 12. I also --

3 THE COURT: Page 12.

4 MR. DUVALL: And please let me give you two more  
5 paragraphs that, from our perspective, I think adequately sum  
6 up what the plaintiffs were trying to do in this case. That's  
7 paragraph 32 and paragraph 212.

8 THE COURT: 212, I read. I want to go back and look  
9 at 32. I know I've read it all. It said, "The class seeks,  
10 among other relief, rescission of the policy, renewal elections  
11 they made, an adequate, forthright, and full disclosure of  
12 Genworth's current financial condition and plan for future rate  
13 increases, and an opportunity to decide, with the benefit of  
14 that information, what policy renewal elections they will  
15 elect going forward."

16 MR. DUVALL: I think that's an apt summary, and the  
17 allegation in the complaint, of what this case was trying to  
18 achieve. As for the general prayer for relief, the damages  
19 that the settlement has been structured to provide would be  
20 what is the money in terms of increased premiums that a class  
21 member like Mr. Jacobs was paying over the course of 2012, '13,  
22 '14, depending on when his or her rate increases started.

23 On no day in his best day in a lawsuit could he  
24 obtain replacement cost from Genworth for switching carriers.

25 THE COURT: Let me ask you something. Suppose that

1 the evidence were to be offered by Mr. Jacobs at a trial that  
2 he had gone to the market in 2014, and in the market he had  
3 gotten a policy, and the policy -- he kept a copy of what he  
4 was going to be able to get. He could have gotten it, and he  
5 qualified for it, and it was the same as the Genworth policy  
6 that he had, his gold policy.

7           Couldn't he recover the difference between the cost  
8 of that policy and the cost of the Genworth policy as damages  
9 for the fraud -- that he would elect then to sue on -- affirm  
10 the contract and sue on the fraud? So he would still have the  
11 Genworth policy, but he would have as damages the difference in  
12 the price if he were to prove that. Wouldn't that be an option  
13 that would have been available to him?

14           MR. DUVALL: I would submit, Your Honor, that his  
15 damages in that case, which, again, he cannot prove that case,  
16 but if hypothetically he were to, his damages would be the  
17 difference -- the increased premiums that he was paying to  
18 Genworth over the years before -- excuse me, after he had  
19 retroactively decided to change carriers. I'm not aware of a  
20 case that would allow him to recover those damages, but the key  
21 point here --

22           THE COURT: Isn't that generally what you can  
23 recover, is the difference between the contract you had and  
24 passed up but for the fraud? There are lots of cases that  
25 present that scenario, I was defrauded, they lied to me, so I

1 stayed with them, I could have had this instead, and the  
2 measure of damages is the difference between what you could  
3 have had -- and that means what it cost you. So that's not --  
4 that's the premium difference is what I thought you just said.

5 MR. DUVALL: We would respectfully contest that and  
6 that the damages were as I described. Your Honor, if  
7 Mr. Jacobs -- again, if he wants to bring that case, that's a  
8 very individualized case. There's a lot of this: Did he  
9 really go out and do this, could he have done it, what would he  
10 have found -- I already previewed what he actually would have  
11 found -- would he have qualified for the policies.

12 If we want to have a trial separately with Mr. Jacobs  
13 on that, that's fine, but no other class members, no other gold  
14 class members are saying, yeah, that's a problem for me, too.  
15 The overwhelming support of the class members is in favor of  
16 this settlement.

17 THE COURT: Anything else on Mr. Jacobs?

18 MR. DUVALL: No, I'll cede back to Mr. Penny to  
19 object other than just to really emphasize that it would -- for  
20 Mr. Jacobs to essentially speak for the class, it's just not  
21 representative of the feedback that we have received on this  
22 settlement. I'll cede the podium. Thank you.

23 THE COURT: Now we're dealing with what; Mr.  
24 Ferrara's objection?

25 MR. PENNY: Yes, Your Honor. That's what I was



1 intending to do if that's okay.

2 THE COURT: All right. That objection is which  
3 number here?

4 MR. PENNY: He's ECF number 170, Your Honor.

5 THE COURT: It is an objection on the basis of  
6 predominance; right?

7 MR. PENNY: Yes, Your Honor.

8 THE COURT: You may address that.

9 MR. PENNY: I just lost the document. Sorry, Your  
10 Honor. One second. So Mr. Ferrara's objection, as he  
11 emphasized several times on Friday's hearing, is based on what  
12 he alleges is the lack of predominance over the materiality  
13 issue. We addressed this directly in our reply to Mr.  
14 Ferrara's objection, and we made it quite clear that the  
15 element of materiality is an objective element.

16 There aren't differences among the class members  
17 because it is an objective standard. We cited several cases in  
18 our reply brief at page 30, footnote 11. For example, we cited  
19 the *Lilly v. Jamba Juice* case which specifically said,  
20 "Materiality is judged by an objective standard rather than any  
21 understanding specific to the individual consumer."

22 We also cited the Supreme Court's opinion in *Amgen*  
23 which said, quote, because materiality is judged according to  
24 an objective standard, the materiality of Amgen's alleged  
25 misrepresentations and omissions is a question common to all

1 members of the class."

2 We also cited to the Restatement (Second) of  
3 Contracts and the Restatement (Second) of Torts that are in  
4 harmony, and both say that a misrepresentation is judged --  
5 whether a misrepresentation is material is judged by a  
6 reasonable person standard.

7 That footnote could have been a page long. This is  
8 the state of the law. Mr. Ferrara's objection on predominance  
9 has no basis in the law. It also has no basis in fact because  
10 what Mr. Ferrara's objection is based on is his presumption  
11 that this narrowly defined class that he has created to  
12 surround his policy has people at a more advanced age who,  
13 perhaps, are in a cohort that are more susceptible to things  
14 like dementia and that as a result of all that, they are  
15 supposedly more locked in to these policies, to use Mr.  
16 Ferrara's term, than other members of the class are.

17 The factual problem with that predicate for Mr.  
18 Ferrara is it's just not true, and it's completely belied by  
19 Genworth's experience with his specific subclass policy pool.  
20 He should know that policyholders in his narrowly defined  
21 subclass have already reduced their benefits or taken  
22 nonforfeiture options at more than 43 percent. This is not a  
23 group of people who are locked in to their contracts. In fact,  
24 that 43 percent is a higher, quote unquote, take rate or higher  
25 rate of people taking reduced benefit and nonforfeiture options

1     than exists in the rest of the class as a whole.

2             Again, it's the exact opposite, I think, of Mr.  
3     Ferrara's presumption, and the factual predicate underlying his  
4     objection is just faulty.

5             THE COURT: All right.

6             MR. PENNY: I don't know that he makes another  
7     objection that's outside that, but I think it's worth noting --

8             THE COURT: What he's saying is because the  
9     predominance -- the lack of predominance on the materiality  
10    element, you have to have a subclass, and the subclass is  
11    people 75 and older.

12            MR. PENNY: Right. And I think, as I just explained,  
13    Your Honor, first, there is no issue of predominance on a  
14    materiality element, and, second, there would be no basis.  
15    Actually, that second point that Your Honor just mentioned  
16    reminds me that Mr. Ferrara's objection -- you could search it  
17    in vain, and you would not find two important things. You  
18    would not find any specific discussion of a conflict that he  
19    thinks that his subclass has with the rest of the class. He  
20    never actually says what the conflict might be if one even  
21    exists. That's important. That's his burden.

22            He also never says what kind of relief he wants for  
23    his subclass. At least Mr. Jacobs articulated a theory where  
24    he could go out to the market and he and his subclass might  
25    have gotten a better deal. I think we debunked that, but he

1 gave some indication of what he was after.

2 Mr. Ferrara has given absolutely no suggestion to the  
3 Court what other remedy he would seek for his subclass. That's  
4 another defect and an important one.

5 It's important to recognize, as I think Your Honor  
6 did at Friday's hearing, that what Mr. Ferrara has done is  
7 arbitrarily create the limits of his class to basically  
8 surround his policy. The reason he's done that is I think Mr.  
9 Ferrara is savvy enough to realize that he cannot come into a  
10 class action settlement and try to demand some individual  
11 relief.

12 So he's tried to create some cover for himself by  
13 creating a narrow subclass arbitrarily defined to surround his  
14 policy. I think he even said as small as he could possibly  
15 make it so that it might be less onerous on the parties to try  
16 to, for lack of a better term, cut his subclass into a better  
17 deal.

18 That's not the purpose of an objection, particularly  
19 when you haven't established any actual conflict between your  
20 class and the rest of the class, haven't provided any  
21 indication of what additional benefits you've had, and actually  
22 your primary objection, which is founded on the predominance  
23 issue with regard to the materiality issue, lacks any legal  
24 background or factual background.

25 I don't know that there's much more to say on that,

1 Your Honor. I think the objection should be overruled on those  
2 bases.

3 THE COURT: Do you have anything to say on Mr.  
4 Ferrara's objection?

5 MR. DUVALL: Yes, please, Your Honor.

6 THE COURT: All right.

7 MR. DUVALL: I think Mr. Penny adequately addressed  
8 Mr. Ferrara's essentially predominance objection to settlement  
9 class. Let me please try and add on and focus on the  
10 predominance issues with respect to Mr. Ferrara's subclass.

11 Mr. Penny noted Mr. Ferrara's attempted to define one  
12 very narrowly for reasons that don't entirely match up  
13 consistently with his own brief and for reasons that I think we  
14 all would have to speculate about, but, in any event, Mr.  
15 Ferrara admitted he picked age 75 as his subclass start age  
16 because he's 75. Well, why not age 70, why not age 65? It's  
17 an arbitrarily defined number.

18 If Mr. Ferrara's answer is, well, because after age  
19 75, there's an increased likelihood of diminished cognitive  
20 function, why not also include class members who are suffering  
21 from Alzheimer's or from dementia or have a family history of  
22 that and may be at a heightened risk? Why not include other  
23 class members that have had an adverse medical event during the  
24 class period, a stroke or another event that, for whatever  
25 reason, made them less or completely uninsurable at this age?

1           And why only gold class policy members as Mr. Ferrara  
2 has proposed? Doesn't this logic apply to all Genworth  
3 policyholders who could have conceivably suffered some sort of  
4 affliction or, as Mr. Ferrara says, aged out during the course  
5 of the class period such that they're in an allegedly different  
6 position?

7           My point in asking these rhetorical questions is Mr.  
8 Ferrara has arbitrarily defined a subclass that, itself, rests  
9 on so many individualized determinations including, like  
10 Mr. Jacobs', whether Mr. Ferrara or anyone else in his subclass  
11 could have qualified for other policies back in 2014, '16, '18,  
12 or could not have, those are individualized issues. So it's  
13 Mr. Ferrara's subclass that can't meet a predominance test.

14           We don't need a subclass in this case. This  
15 settlement gives each policyholder, regardless of age, medical  
16 condition, financial condition, value judgments about their  
17 policy and whether they want it or whether they want to pay  
18 less premiums, the same menu of options, and they can make  
19 whatever choice they want including, as Your Honor noted, to  
20 keep their policy as is.

21           I don't know if Mr. Ferrara doesn't want to keep his  
22 policy. I don't know whether he can afford his policy.  
23 He's -- I know he's a lawyer, and his colleagues are on the  
24 phone. This is a very creative theory, but it's just not  
25 necessary for this case. The settlement class is a cohesive

1 class that satisfies predominance, satisfies commonality. Mr.  
2 Ferrara's subclass isn't.

3 And a final point, and I'll cede the podium on  
4 this --

5 THE COURT: So what do you say -- I was going to ask  
6 Mr. Penny the same thing. What are the common issues common to  
7 the class, and why do those common issues predominate?

8 MR. DUVALL: The common issues are that the  
9 information that was allegedly -- whether the information that  
10 was allegedly withheld from these policyholders, the capital D  
11 disclosures, the two disclosures at the centerpiece of this  
12 settlement, whether that information would be material to any  
13 particular class member, and the common result of that is that  
14 they can each take that information and make whatever choice  
15 they want with that information. They can elect one of the  
16 five options, or they can keep their policy as is, same  
17 information, same menu of choices, and the beauty of it is they  
18 can do what they want.

19 This is a better settlement than, for example, saying  
20 we're going to cut down everyone's benefits or we're just going  
21 to give everyone some cash. They can choose from these menu of  
22 options and do what they want.

23 To that point, Your Honor, to the extent that --  
24 again -- I know we're done with Mr. Jacobs for now, but to the  
25 extent he wants better relief for himself or to the extent Mr.

1 Ferrara, to use Mr. Penny's terms, is using a subclass to get  
2 better relief, this is a settlement. This provides valuable  
3 options to all the class members.

4 If they can articulate -- this goes for Mr. Ferrara.  
5 If he can articulate a theory by which he could, perhaps,  
6 extract some additional benefit, which I don't see it, then  
7 same point with him. That's not the stuff of an objection.  
8 That's an opt-out, and it's not a reason to tank this  
9 settlement for the rest of the class that supports it.

10 THE COURT: All right. Mr. Penny, what are the  
11 common issues? He identified the materiality of the  
12 information that was omitted as the common issue. Is there any  
13 other common issue?

14 MR. PENNY: Yeah. Consider, Your Honor, all of the  
15 common facts which I'm going to give to you right now. All of  
16 these policyholders, everybody in the class, has a choice one  
17 policy. They've all bought the policies back in the early  
18 2000s and all had them --

19 THE COURT: That's a fact issue.

20 MR. PENNY: Well, common issues of fact are just --  
21 are the same as common legal issues to a certain extent. We'll  
22 get to the legal issues in a moment. So they're all purchasing  
23 their policies in early 2000. None of them have gotten any  
24 rate increases prior to 2013 which means they're all in the  
25 same boat where they have these policies, they know that they



1 might be subject to future rate increases, but none of them  
2 have gotten any for about a decade.

3 Then all of a sudden starting in 2013, all of the  
4 class members start getting really significant and sequential  
5 rate increases. All of them are given the same information  
6 about those rate increases, and, more importantly, they are all  
7 deprived of the same allegedly more material information.

8 Every single one of them were faced with the same  
9 decisions, the same quantitative and qualitative decisions when  
10 they got rate increases which is they were given options to  
11 reduce their benefits, to walk away from their policy, or to  
12 make some other policy form changes -- I'm sorry, or to keep  
13 their benefits the same and pay the higher premiums, and every  
14 single one of them had to make that same decision without the  
15 benefit of the allegedly material disclosures that they're  
16 getting in the settlement.

17 They're all similarly situated because they all have  
18 been mistreated, allegedly, by Genworth in the same way. What  
19 the settlement allows them to do is, on those common issues,  
20 give all of them the disclosures, give all of them essentially  
21 the same menu of options, and give all of them the option to  
22 reduce their benefits, walk away from their policies, do  
23 whatever they may do, or keep their policies the same.

24 That's a very cohesive class, and the important thing  
25 about the structure of this settlement is the only issue that

1 might be individual to any of them is what exactly will they  
2 elect in the settlement: Keep their benefits, elect one of the  
3 five options, or other. And the settlement allows them to do  
4 that individually without conflicting with each other, because  
5 one class member's decision in the settlement has no effect on  
6 any other class member's.

7 Not a common fund. It's not like the relief is only  
8 offered to somebody until, you know, that relief has been  
9 claimed up to a certain level and then other people have  
10 different choices. There's no conflicts, and the only  
11 individual issues that could be considered in this case are  
12 allowed to be decided individually in the settlement.

13 THE COURT: And the common issues of law?

14 MR. PENNY: Look at the fraud claim. What were the  
15 allegedly misleading disclosures, were they material, what is  
16 the -- what are the damages that flow from that.

17 THE COURT: Basically it's a materiality of the  
18 disclosure. The rest of it is fact; right?

19 MR. PENNY: Yes, but that doesn't mean that there  
20 aren't common issues that predominate. Usually common  
21 issues are --

22 THE COURT: A, were they made -- the elements of a  
23 fraud claim are were they made, the misrepresentation by  
24 omission, was it relied on, was it material, did damage ensue,  
25 and then, depending upon the applicable law, was it intentional

1 or was it negligence. Those are the elements; right?

2 MR. PENNY: Essentially, yes, Your Honor.

3 THE COURT: What other legal issues are there other  
4 than materiality? Or is materiality a fact issue or legal  
5 issue?

6 MR. PENNY: It's an element of the claim. I don't  
7 know if you want to call certain elements factual elements or  
8 legal elements. They're all elements of the claim that the  
9 class members have in common with each other.

10 THE COURT: All right.

11 MR. PENNY: I'm asking Your Honor, should I move on  
12 to the Agulnicks' objections, or is there more to be done on  
13 the Ferrara objection?

14 THE COURT: I think what we'll do at this time is  
15 hear what Mr. Jacobs and Mr. Ferrara have, and then we'll move  
16 on to the other one.

17 MR. PENNY: Okay.

18 THE COURT: Mr. Jacobs, you've heard what they have  
19 to say. Do you have anything else to say in response to what  
20 they said?

21 MR. JACOBS: Yes, I do, Your Honor, thank you.

22 Forgive me. I'm not as polished in my presentation. I've  
23 never done this before, but a couple things I would like to  
24 say.

25 One thing that clearly doesn't make sense here is --

1 why Genworth is so anxious to settle this is, they committed a  
2 fraud. They did something wrong. We're hurt. How is it that  
3 Genworth is actually going to gain by this suit? They want  
4 this suit to be settled. They will profit from this, and if  
5 you look at page -- the bottom of page 23 in the attorney's  
6 response to objections, it clearly says that they will most  
7 likely benefit from this.

8 THE COURT: Excuse me. The bottom of page 23, what  
9 language are you talking about? That's on ECF 177. That's the  
10 response. What are you talking about?

11 MR. JACOBS: It says don't worry about Genworth's  
12 ability to pay because --

13 THE COURT: Wait a minute, Mr. Jacobs. You just read  
14 the exact language to me.

15 MR. JACOBS: You want me to read the exact language?

16 THE COURT: I want to know what you are saying -- you  
17 made the statement that Genworth said that they will profit  
18 from this settlement.

19 MR. JACOBS: Okay. I'll be happy to. I'll read the  
20 paragraph. "Initially, Genworth has represented to class  
21 counsel that it will be able to pay the attorneys' fees and  
22 expenses negotiated under the settlement, as well as the cash  
23 damages payments elected by settlement members. As for  
24 objectors' concerns about the impact of these payments on  
25 Genworth's 'financial condition,' class counsel notes that to

1 the extent the class members elect special election options  
2 that reduce their coverage, it logically and mathematically  
3 follows that Genworth's overall claims liability will be  
4 reduced correspondingly, which may improve Genworth's  
5 'financial condition' and ability to pay."

6 THE COURT: All right, thank you. Anything else?

7 MR. JACOBS: Yes. If I may, attorney for Genworth  
8 stated that why didn't I do something in -- why didn't I change  
9 policies in 2014, and my answer is why would I do that in 2014?  
10 I was not aware of the fraud that was committed by Genworth,  
11 and at that time, yes, I was satisfied with that policy. If  
12 they told me that in a few years you're going to end up  
13 spending \$27,000, I would look at other things.

14 The other thing I would like to talk about is the --  
15 Mr. Penny continues to say that he has 4,000 people who have  
16 approved of this. I mean, does he have a list of names, can he  
17 document that, and, of that, how many are of the gold class  
18 member standards? I understand other groups possibly  
19 considering this.

20 Another important point that I would like to make is  
21 that I was gravely misled about the Skochins. I had asked  
22 before I entered my objection letter, you know, who is  
23 representing gold class members, and they said, well, the  
24 Skochins are gold class members.

25 As it turns out, I found out this past Friday, as we

1 all did, that the Skochins were not gold class members. They  
2 opted out in 2018, so, of course, they're going to be thrilled  
3 to accept any policy that gives them more money, any benefits  
4 from this lawsuit that gives them more money along with the  
5 \$50,000. So they were more than anxious to approve and did not  
6 have the interests at heart of the 47,000 people that are, in  
7 fact, gold members.

8 In addition, I can tell you, just like he said, well,  
9 you know, the policies in 2014 were, you know, who knows what.  
10 The fact is, I checked policies in 2020, and there's a policy  
11 that I would have been open to which was a dual combination  
12 which allows up to 12 years between me and my wife, and the  
13 price was less than what I'm paying now for Genworth and  
14 appears, from research, that it would actually end up being  
15 much less over the years in converse to the \$27,000 from  
16 Genworth.

17 I think that these attorneys, Genworth and our  
18 attorneys, simply chose to ignore that there's a group of  
19 people that had different needs, and they -- that they should  
20 be accounted for.

21 I mean, even the offering that they're doing, the  
22 options, are options that, you know -- if they pick option five  
23 or if they pick option four, they would go down from -- I'm  
24 sorry. In certain cases they would go down from five years  
25 coverage to four years, four years to three years. Ours has

1 gone from unlimited coverage to a maximum of six-year coverage  
2 at two-thirds the price -- at two-thirds the daily rate that  
3 we're getting in the hospitals.

4 They just ignored it, and they're using every tactic  
5 in the book right now to defame the gold class members and, you  
6 know, try and get out of this issue that they simply chose to  
7 ignore and Genworth didn't want to touch because it would be  
8 too expensive for Genworth.

9 Genworth would make money off of this. And the final  
10 thing, just one final thing that I would like you to do, and I  
11 would urge you to look at, again, the response -- this really  
12 sums it up beautifully. The response on page 37 and 38 of the  
13 plaintiffs' retort to objections. If I may read it, it's three  
14 very short paragraphs regarding California's opinion on what's  
15 taking place here. If I may?

16 THE COURT: Page 37?

17 MR. JACOBS: And 38, yes.

18 THE COURT: You want to read -- you are talking about  
19 the thing that begins "in response" and ends with the paragraph  
20 that -- second paragraph is on the next page, says "class  
21 counsel appreciates," and the next one, "initially," and the  
22 next one is "also important."

23 MR. JACOBS: No, Your Honor. It's really the second  
24 paragraph on page 37, "California class members should not be  
25 asked to take reductions." Do you have that?

1 THE COURT: What's the beginning word in the  
2 paragraph?

3 MR. JACOBS: "California class members should not be  
4 asked."

5 THE COURT: That's page 37 of 177?

6 MR. JACOBS: It's page 37 of the response -- at  
7 least -- of the response of -- the plaintiffs' lawyer's  
8 response to our objections.

9 THE COURT: Yeah, number 177, and there's nothing  
10 like that on page 37 that I can find.

11 MR. JACOBS: Maybe the attorney can refer to it. May  
12 I read it to you?

13 THE COURT: Look at the top of the document. Does it  
14 have a number on it?

15 MR. JACOBS: No. I don't have -- no. The document  
16 that I was given was really with just basically page numbers by  
17 my attorneys.

18 THE COURT: Does it have a first page? Does the  
19 document you are reading from have a first page?

20 MR. JACOBS: It certainly does.

21 THE COURT: Stop talking and find it and read it to  
22 me, please, sir, the title. What does it say?

23 MR. JACOBS: The first page, very first page says  
24 Skochin -- Jerome Skochin, Susan Skochin, and Larry Huber,  
25 individually --



1 THE COURT: Excuse me. Go down and look at the bold  
2 type below that. What does it say?

3 MR. JACOBS: "Plaintiff's reply in support of (1)  
4 motion for final approval of class action settlement, and (2)  
5 class counsel's motion for an award of attorneys' fees and  
6 expenses service awards" --

7 THE COURT: That's ECF number 177. You want me to  
8 turn page to 37. Is it 37 on the bottom of the page or 37 on  
9 the top of the page?

10 MR. JACOBS: It's on the bottom of the page.

11 THE COURT: Now stop a minute. On that page, go to  
12 the very first line and read the first five words.

13 MR. JACOBS: Okay. On the top of the page, page 37,  
14 "a consequence of this proposed settlement agreement" --

15 THE COURT: All right. That's fine. Now go down  
16 that page and count the lines and tell me where you want me to  
17 look and tell me the line number.

18 MR. JACOBS: Okay. I'm sorry. It's line -- where it  
19 says "Court dated June 12" -- oh, okay. Okay. It's -- the  
20 paragraph that starts with "To its credit," and it's --

21 THE COURT: That's an indented paragraph where they  
22 are quoting from the California Department of Insurance.

23 MR. JACOBS: Correct.

24 THE COURT: I've read that. Now what about it?

25 MR. JACOBS: It speaks perfectly clear that -- it

1 says it all, that they're concerned that the policyholders may  
2 forfeit policy benefits that are worth substantially more than  
3 the compensation they would receive and, conversely, that  
4 settlement could provide Genworth with a windfall if deductions  
5 to future claims and reserves and obligations greatly exceed  
6 damages.

7 So the paragraph before that explains what the  
8 attorneys did not do, what they should do. Mr. Penny gave all  
9 these calculations of --

10 THE COURT: The paragraph before that doesn't say any  
11 such thing as that. You quit flailing around with words and  
12 attribute them to the -- attributing them to a statement in a  
13 document, and you confine yourself to what's in the document  
14 when you are quoting the document. If you want to make a  
15 statement on your own, you can, and I think your time is about  
16 up because you're wasting everybody's time now.

17 Your point is that the California Department of  
18 Insurance said, "However, class members should not be asked to  
19 take reductions to their policy benefits that are  
20 disproportionate to the proposed cost savings and settlement  
21 compensation." And you agree with that; is that right?

22 MR. JACOBS: Yes, sir. They never performed a cost  
23 analysis on the paragraph --

24 THE COURT: That isn't what this says. That isn't  
25 what this says. Now, your point is they should do a

1 cost-benefit analysis; is that right? Yes or no?

2 MR. JACOBS: Yes.

3 THE COURT: All right, thank you. Now, do you have  
4 anything else, any other point you wish to make in response to  
5 what Mr. Penny and Mr. Duvall said?

6 MR. JACOBS: No. Thank you very much, Your Honor.  
7 No.

8 THE COURT: All right, Mr. Ferrara, you have the  
9 opportunity to say anything you'd like to say in response to  
10 what they said.

11 MR. FERRARA: Thank you, Your Honor. So, first, I  
12 certainly accept the compliment from counsel that I've been  
13 creative. Trust me, Your Honor, there was nothing creative  
14 about what I've done. I simply read the rule and the two  
15 leading Supreme Court cases on the subject. There was nothing  
16 creative about it at all.

17 Let's turn to their comments, and I'll try to  
18 respond, although I probably can't respond with the elegance  
19 that they have delivered given their preparation time. So,  
20 first they say that there are common elements -- sorry, common  
21 questions of fact and law that go throughout this case, and  
22 they went through a whole list of them. I think that list is  
23 as good a list as we're going to find both on the questions of  
24 fact or law that satisfy Rule 23(a).

25 However, the way this rules works on 23(b)(3) is that

1 those common questions, that whole laundry list that's been  
2 provided by counsel, have to predominate over questions  
3 affecting individual class members. Let's focus on that issue  
4 very carefully, because that's what this Court is going to be  
5 focusing on.

6 Now, no one in this courtroom, I think, would  
7 disagree with the proposition that in passing upon this  
8 settlement, the principal feature that one looks to as the  
9 jurist in this matter is the likelihood that plaintiff will  
10 succeed if there's litigation on the merits. That's the key  
11 question.

12 Now, let's look at that question in terms of  
13 predominance. On the one hand, you have insurable policy  
14 owners who continued, as a class, to make premium payments  
15 after the fraud was exposed, and that defeats any claim that  
16 the half truths were material. That's one side of the case.

17 THE COURT: What? Say what you said again.

18 MR. FERRARA: Yes. I said insurable policy owners  
19 who continued as a class, as a group, a cohort, to make premium  
20 payments after the fraud was exposed defeats any claim that the  
21 half truths were material. Now, that is one side of the case  
22 on whether they'll win, who will win. Let's take a look at the  
23 other group, the other policy owners.

24 THE COURT: Wait a minute. How is that -- according  
25 to the allegations, there were people who made payments,

1 continued to make payments because they didn't have any other  
2 choice. That doesn't mean that they're not material. That  
3 means that they didn't have any other choice, as I understand  
4 the allegations in the complaint.

5 MR. FERRARA: I think that the counsel for Genworth  
6 has said that there were no other choices. I suppose that the  
7 policy owners at the time, had they known the truth, would have  
8 explored other options other than reducing the level of  
9 coverage in their policies.

10 THE COURT: Excuse me a minute, Mr. Ferrara. When  
11 was the truth disclosed, in your estimation?

12 MR. FERRARA: Well, according to the plaintiffs, as I  
13 recall it, Your Honor, they take the position that at point of  
14 sale, there was created a, quote, expectancy, close quote, that  
15 rates would never be changed.

16 THE COURT: Mr. Ferrara, excuse me. I didn't ask you  
17 that question. I asked you a question about when the truth, as  
18 you say it, was disclosed, and you're making the point that  
19 part of the case -- I'm not quite sure why you are making it,  
20 but you're making the point that part of the case is that  
21 people continued to make payments after they knew the truth of  
22 the matter, and, therefore, the non-disclosed material --  
23 information was not material. My question to you is, in that  
24 statement, when do you contend that the truth was disclosed?

25 MR. FERRARA: All I can contend, Your Honor, is

1 what's in the complaint.

2 THE COURT: Well, Mr. Ferrara, if necessary, I can  
3 fence with you for as long as you want to fence. I've been  
4 doing it for a long time, but I'm not asking you that. If you  
5 say it's in the complaint, you tell me where it is in the  
6 complaint that it was disclosed. Give me the page, paragraph,  
7 and number.

8 MR. FERRARA: The complaint says -- I can't give you  
9 the paragraph and number. 2018 is the time when the plaintiffs  
10 allege that the fraud was originally disclosed, and I accept  
11 that for purposes of this discussion.

12 THE COURT: All right.

13 MR. FERRARA: So we are talking about whether these  
14 common questions predominate. We talked about one half of the  
15 equation. The other half of the equation is determining who  
16 has the likelihood of success is those policyholders who I've  
17 said are vulnerable for all of the reasons identified in my  
18 approach and what I said last time which was the additional  
19 factor, not the sole factor but the additional factor of  
20 dementia.

21 With respect to that group, they don't have this  
22 immateriality problem. They have a strong argument, and if  
23 this subclass, this cohort of individuals who are I call  
24 vulnerable, contested this case, they'd have a dramatically  
25 better chance of prevailing over those claims than does the

1 class that basically continued to pay after the fraud was  
2 disclosed. So, to me, that's a predominance issue.

3 Let me flip now, if I may, Your Honor, because I want  
4 to respond to all of their questions. They say that there is  
5 an objective materiality standard, and that's correct, Your  
6 Honor. It is objective which only means that a reasonably --  
7 sorry. The decision has to be made objectively with respect to  
8 materiality whether there's a reasonable similarity of  
9 similarly situated vulnerable class members to determine  
10 whether or not materiality is there or not objectively. It is  
11 not a question that all are treated the same way.

12 Now, they refer to the *Amgen* case, and, Your Honor,  
13 I'm well and I'm sure this Court is well acquainted with *Amgen*,  
14 but in that case, the Court was saying, the Supreme Court was  
15 saying, as I recall it, that the materiality was the same for  
16 all class members because if the case -- if the determination  
17 was made that the misstatement was material, then it would --  
18 sorry, was immaterial, it would affect everyone the same way,  
19 all class members the same way. Here, since there is such a  
20 division of likelihood of success on the materiality issue, the  
21 *Amgen* dialogue on that subject is not relevant to this case.

22 Let me turn to the next point that they raise. They  
23 say that what are the conflicts. Your Honor, I never use the  
24 word conflicts in my approach. What I suggested was there need  
25 be a subclass of these vulnerable policy owners who are

1 separately represented who can then make a determination of  
2 what should be done for that subclass. I have no objection to  
3 class counsel representing the subclass as well if they feel  
4 they can do so without conflict. I have no interest in  
5 counseling that counsel for the subclass as to what they should  
6 ask for. That's between the lawyer and the client of the  
7 subclass.

8           Next, the kind of relief that I suggested, Your  
9 Honor, my role in this case has been to point out, or to try  
10 to, the predominance issue and 23(b)(3). I suggested that this  
11 problem can be solved with a subclass. I put in there some  
12 thoughts about subclass relief, but the subclass relief to be  
13 demanded has to be made by the subclass and its representative,  
14 and I'm not a representative of the subclass. They need their  
15 counsel.

16           THE COURT: All right.

17           MR. FERRARA: Finally, Your Honor, you know, I  
18 certainly don't object to the erudition with which counsel for  
19 Genworth and for the plaintiffs have expressed their opposition  
20 to my objection. I expected that, and I respect that the  
21 thoughtfulness has been given in responding to me.

22           However, Your Honor, I don't think that it's  
23 appropriate that they lace into to their response the ad  
24 hominem attack of me saying I chose 75 because that's my age.  
25 What I said yesterday was that the proper age, looking at the



1 statistics I cited in my opposition, is probably around 70 and  
2 a half, but what I said was, I thought 75 was better because it  
3 would keep the subclass small enough for Genworth to be able to  
4 deal with it and still take care of the most vulnerable group.

5 So I had an honest intention of why I took 75 and  
6 didn't expect to be criticized in an ad hominem way for it.  
7 Your Honor, I'm finished. Thank you for your patience with me.

8 THE COURT: We're going to go ahead and take lunch  
9 here in a minute, but let me tell you something. I want you to  
10 tell me in your motion for approval and the brief in support,  
11 ECF 135 and 136 --

12 MR. FERRARA: That's not mine, Your Honor.

13 THE COURT: I'm sorry, Mr. Ferrara. I'm talking to  
14 plaintiffs' counsel.

15 Where in there does it discuss predominance and what  
16 the predominant issues are? His point is there really aren't  
17 any predominant issues of law, and you were skimpy in  
18 discussing what they were to begin with. You pointed to a  
19 large number of predominate issues of fact, and there are. And  
20 sometimes you approve classes.

21 I know there was a discussion of it fairly  
22 extensively in the motion for preliminary approval, and you do  
23 discuss it in 177. Let's see, what page is that? Where is  
24 that? The final document you objected to people, where is that  
25 discussion of Ferrara's objection?

1 MR. PENNY: Right now, Your Honor, are you asking me  
2 where in the reply brief do we respond to --

3 THE COURT: Yeah. I just want to lay my hands on it  
4 right quick.

5 MR. PENNY: Hang on one second.

6 MR. DUVALL: Brian, would you like me to help you  
7 out?

8 MR. PENNY: So the issue on predominance in the reply  
9 brief is addressed at page 30, and if you're looking at the ECF  
10 page numbers, that's 35 of 47.

11 THE COURT: I got it. I'm just trying to make  
12 sure --

13 MR. FERRARA: Your Honor, this is Mr. Ferrara. You  
14 might want to ask the plaintiffs' counsel to identify the page  
15 in their opening brief in support of sending notice. They do  
16 talk about predominance there. They give it one paragraph and  
17 then run off and talk about reliance which is not the  
18 predominance issue. If they can give you the cite to that  
19 page, you'll see it.

20 THE COURT: It's the paragraph that begins "to the  
21 extent," and then there's a footnote 11.

22 MR. PENNY: Yes, Your Honor.

23 MR. FERRARA: Regrettably I don't have that document,  
24 but, if I recall, there's one paragraph on the predominance,  
25 and the rest of the page is talking about reliance. So the

1 full extension, the full attention given to predominance is one  
2 paragraph and doesn't touch on any of the issues on  
3 predominance. It just repeats that predominance is a factor  
4 and it's been satisfied, period. That's all it said.

5 THE COURT: Mr. Ferrara, I was talking with  
6 Mr. Penny, not you. But I appreciate having your information,  
7 and we'll go look at the document -- you are talking about the  
8 motion for preliminary approval, I believe.

9 MR. FERRARA: Yes, sir.

10 THE COURT: Yes, Mr. Penny.

11 MR. PENNY: I was just going to point out for Your  
12 Honor, the reason that most of the attention is given to the  
13 reliance element is that is usually the element that is most  
14 difficult to meet on a predominance inquiry. Materiality is  
15 almost a given, as I think basically Mr. Ferrara has  
16 acknowledged. Materiality is an objective criterion, and it is  
17 almost always a common issue for the entire class as it is  
18 here.

19 THE COURT: Is materiality a question of law or fact?

20 MR. PENNY: I think it's a question of law, Your  
21 Honor, but I don't know -- there's not a requirement, even in  
22 the Supreme Court cases that Mr. Ferrara addresses, that the  
23 common issues be common issues of law as opposed to common  
24 issues of fact. In fact, they can be both.

25 THE COURT: The analysis is, are there common issues

1 of law and fact or law or fact, and in order for me to comment  
2 on that intelligently, I need to know what you say are the  
3 common issues of law and what are the common issues of fact.  
4 You have identified for me the common issues of fact. You have  
5 not identified the common issues of law until just then when  
6 you told me materiality was a question of law.

7 I'm sure you'll be able to root through things over  
8 lunch and get back. We will take an hour for lunch. It's five  
9 minutes to 1:00. We'll be back five minutes to 2:00.

10  
11 (Luncheon recess.)  
12

13 THE COURT: All right. Now, right before lunch, I  
14 thought -- I may be wrong, but if I am, tell me -- that you  
15 told me that materiality was a question of law; right?

16 MR. PENNY: Yes, Your Honor.

17 THE COURT: In your brief filed -- I don't know what  
18 the docket number of this thing is -- December 20 -- give me  
19 the docket number of that, plaintiffs' memorandum of law in  
20 support of motion to direct notice of proposed settlement to  
21 the class.

22 MR. PENNY: 92.

23 THE COURT: In your brief there, on page 28, it says,  
24 "Whether Genworth's failure to disclose its need for  
25 substantial rate increases was material to insureds is a

1 question of fact for a jury," citing *Amgen*.

2 MR. PENNY: Yeah, Your Honor, it looks like I  
3 misspoke there.

4 THE COURT: Which one?

5 MR. PENNY: Looks like it's a question of fact for a  
6 jury to decide, particularly since it's an objective element,  
7 so I apologize.

8 THE COURT: Are there any common questions of law?

9 MR. PENNY: Yes, Your Honor.

10 THE COURT: What are they?

11 MR. PENNY: If you look at the same brief, at pages  
12 23 and 24, we talk about commonality, and we list a couple  
13 of --

14 THE COURT: Just a minute. Let me get there. I did  
15 look at it, actually, over lunch. Common questions include  
16 whether the partial disclosures created a duty to make a full  
17 disclosure. That's a question of law, is it?

18 MR. PENNY: Yes, Your Honor.

19 THE COURT: That is a question -- whether Genworth  
20 breached the duty. It seems to me that's a question of fact.

21 MR. PENNY: Well, I believe questions of duty and  
22 breach would be -- I think duty would be a question of law.  
23 Breach might be a question of fact and law mixed.

24 THE COURT: I think it is. Then the next one is  
25 entitled to damages. That's a common question of law; what?

1 Common question of what?

2 MR. PENNY: What damages they would be entitled to,  
3 whether injunctive relief or declaratory relief they'd also be  
4 entitled to, those are common questions of law.

5 THE COURT: There's nothing else other than what's  
6 there, is there?

7 MR. PENNY: A little bit further on closer to the  
8 section Your Honor was looking at earlier, at page 26 through  
9 28, there is a discussion of the element of reliance and how  
10 reliance, in a situation such as this which we're dealing with  
11 form contracts and material omissions, can be presumed, that  
12 would be a question of law that would be common for the class.

13 THE COURT: Why is that a question of law? Why isn't  
14 reliance a quintessential question of fact which is what makes  
15 it uniquely amenable to jury trials? Whether I relied on  
16 something is a question of fact, it seems to me. Now, it says  
17 here that you can presume reliance, but I'm not sure that's  
18 adequately treated. My recollection is that -- in the papers.

19 My recollection is that that's sort of a unique  
20 concept, and I've lost exactly what the context of that  
21 statement is, but it probably needs to be fleshed out.

22 MR. PENNY: Well, I think the important point, Your  
23 Honor, is that --

24 THE COURT: So reliance -- here's the statement that  
25 somewhat perplexes me. Page 26 in document number 92,

1 "Although reliance is generally an element of a fraud claim,  
2 and Rule 23's Advisory Committee's notes to the 1996 Amendment  
3 cautioned reliance may not be well-suited for a class status  
4 where 'material variation in the representations made or in the  
5 kinds of degrees of reliance by the persons who whom they were  
6 addressed' are present, the notes also find it appropriate to  
7 use a class device to resolve cases involving 'fraud  
8 perpetrated on numerous persons by use of similar  
9 misrepresentations,' as here."

10 Now, I would think that the price of a product, which  
11 is what was not disclosed here, and the need for an increase of  
12 the price over time would be a factual issue that would be  
13 material, and I don't have any problem finding that. But what  
14 about reliance? You see, it seems to me that Mr. Jacobs and  
15 Mr. Ferrara are really talking about the kind or degree of  
16 reliance. Does that, then, necessitate an analysis of the  
17 predominance question that is somewhat different than the way  
18 you've addressed it?

19 MR. PENNY: No, for a couple of reasons. First, even  
20 if we construe their complaints or objections through the lens  
21 of reliance and a predominance issue, the facts just don't bear  
22 that out. They are presuming that everybody else that has  
23 their same level of policy, same level of benefits sees the  
24 world the same way they do, and that's not true.

25 We've seen from the numbers and from the historical

1 reaction of the class that a lot of class members have already  
2 reduced their benefits. They're going to find these settlement  
3 options that allow them to make the same reductions but get  
4 cash damages payments back to be very attractive.

5 And back to the issue of reliance itself, though --

6 THE COURT: Doesn't that argument just actually say  
7 that they are -- these are individual, very individualized  
8 decisions that should be made as to whether they relied much or  
9 relied at all on the representations?

10 MR. PENNY: There's nothing wrong with recognizing  
11 that there might be some individual decisions in a class case.  
12 The idea of a class action isn't that everybody is identical.  
13 It's that there are efficiencies to be gained by litigating  
14 their claims together. That is the case here.

15 And predominance is primarily an issue for the trial  
16 court when looking at certifying a class for a trial, because  
17 often, if issues don't predominate, for example differences in  
18 state laws or something like that, it is going to make the  
19 trial of the case impractical.

20 The *Amgen* case from the Supreme Court in the late  
21 1990s made it pretty clear that when you're dealing with a  
22 settlement approval, the predominance issue is much easier to  
23 meet. And the *Dukes* case from the Supreme Court also makes it  
24 quite clear that you do not have to have every single element  
25 or issue at law to be exactly the same for every class member.



1 You are just looking to see whether there are common issues,  
2 even if the common issue is just one, that drives the lit --  
3 that drives the resolution of the claims.

4 Here, whether you call them issues of fact or issues  
5 of law, the duty, breach, causation, materiality, reliance  
6 elements that we identified before are all of the elements of  
7 the claim. So, again, whether you call them fact, whether you  
8 call them law doesn't really matter. Essentially they are all  
9 being resolved collectively.

10 THE COURT: The Fourth Circuit has called the  
11 materiality a mixed question of law and fact.

12 MR. PENNY: Okay. Again, I don't think it's  
13 important whether we define each one as a question of law or a  
14 question of fact and put it into buckets, because, again, the  
15 *Dukes* case is very clear. This is not a quantitative analysis.  
16 It is a qualitative analysis. You want to ensure that the  
17 common issues that drive the resolution of the case are going  
18 to be acceptable or susceptible to common proof.

19 Back to the reliance on the fraud example that Your  
20 Honor was quoting from the rules, the point there is --

21 THE COURT: I was quoting from your brief.

22 MR. PENNY: I'm sorry, from my brief which was, in  
23 turn, quoting from the Federal Rules, the comments to them. If  
24 you have a fraud case in which you are trying to say, well,  
25 insurance agent A told me this and insurance agent B told him

1 something else, did they both buy the policy for the same  
2 reason, that would create two individual issues. You have two  
3 different representations with two different assessments of  
4 materiality for two different plaintiffs.

5 But what that quote is saying is, when you have the  
6 same misrepresentations, especially if they're omissions, that  
7 are the same to all the class members, that creates a  
8 commonality of interest. And, again, the wonderful thing about  
9 this settlement --

10 THE COURT: In part, that's the *Stanich* case?

11 MR. PENNY: Yes, Your Honor, the *Stanich* case is a  
12 very good example.

13 THE COURT: But the *Stanich* case involved home  
14 insurance, didn't it?

15 MR. PENNY: Yes, Your Honor, but the point in *Stanich*  
16 was --

17 THE COURT: Does it makes a difference that here  
18 we're talking about an insurance that relates to your health,  
19 particularly to coverage in your old age and that everybody  
20 looks at that somewhat differently depending upon their own  
21 health situation and their own medical circumstances?

22 MR. PENNY: Not necessarily, Your Honor, but, again,  
23 the thing about this settlement is it creates a mechanism where  
24 all the class members are treated alike, and on that issue that  
25 Your Honor is raising which is, well, what might I have done

1 differently about my policy, they get to make those choices by  
2 themselves unaffected by what other class members are doing.

3           So all of the reasons you want to ensure you have a  
4 cohesive class are addressed in the settlement even if there's  
5 some concern that there are individual issues being raised,  
6 because the settlement does not pit class members against each  
7 other, it doesn't disenfranchise them. If another class member  
8 selects a different option, it treats them all the same by  
9 giving them the same disclosures, which were the hub of this  
10 case, and the same options to makes changes to their policy,  
11 and there are no -- there's no -- there are no subclasses of  
12 this group that aren't represented in the settlement.

13           Again, Mr. Jacobs is saying I don't like these  
14 options. There are going to be several people who say I'm not  
15 going to change my policy based on the disclosures even with  
16 these options that are given to me, but it's not like his group  
17 isn't getting good options. That option five, which reduces  
18 the unlimited term to a limited term and still has five percent  
19 compound interest protection and puts thousands of dollars back  
20 into his pocket, that looks just like the silver class policy  
21 he wanted to go out in the market and buy.

22           I don't know if he doesn't see that, he doesn't care,  
23 whatever it is, but it's not like his group is being left  
24 behind, and he thinks that by not being -- he thinks that  
25 everybody else in the gold class policy feels exactly the way

1 he does, and that is not the case. As we just showed Your  
2 Honor, over 40 percent of gold class policyholders have already  
3 reduced their coverage outside the settlement. They did that  
4 and got absolutely nothing in return.

5 This settlement puts everybody in a much better  
6 position, and if there are legal issues that we wouldn't have  
7 been able to carry at trial about class-wide reliance or  
8 something like that, the party that would have been harmed by  
9 that is Genworth who is agreeing to the settlement. Class  
10 members are better off in this settlement than they ever would  
11 be without.

12 THE COURT: All right. Anything else on those two  
13 objections?

14 MR. PENNY: Only just to point out that Mr. Ferrara,  
15 when he alleged that the complaint said that the fraud was  
16 revealed in 2018, that is not what the complaint alleges. The  
17 complaint alleges that for a few policyholders in 2018, there  
18 was a step towards a more fuller disclosure, and the reaction  
19 of the class to that shows that they needed more material  
20 disclosures as well.

21 So there is not this issue that Mr. Ferrara presented  
22 where the fraud has been disclosed to the class in 2018 and  
23 then people decided they're still going to keep paying their  
24 premiums. That is not at all true or accurate.

25 THE COURT: All right.

1 MR. PENNY: The only other point I'd make is he keeps  
2 talking about his subclass being a more vulnerable group, and  
3 he said that they have a stronger claim, but he still hasn't  
4 explained why he thinks they have a stronger claim, why their  
5 group is any differently situated than everybody else. Looking  
6 at historical claims reduction practices of his group versus --  
7 they are no different than anybody else. There's just no  
8 reason to treat them any differently than the rest of the  
9 class.

10 And he still hasn't pointed out any conflicts, so,  
11 again, the basis for a subclass doesn't seem to make any sense.  
12 And even if this predominance issue had some teeth to it at  
13 some point, his subclass doesn't seem to address that in any  
14 way.

15 THE COURT: Are you going to address Mr. Luck's?

16 MR. PENNY: You mean the Agulnicks'? Mr. Luck's  
17 objection was overruled --

18 THE COURT: Agulnick, excuse me.

19 MR. PENNY: Okay. So the first issue that the  
20 Agulnicks raised had to do with the -- they alleged undefined  
21 terms in the settlement agreement, and on Friday --

22 THE COURT: What document, what is their objection?

23 MR. PENNY: I'm sorry, Your Honor.

24 MR. PETTY: 162.

25 MR. PENNY: 162.

1           THE COURT: All right, thank you. All right, go  
2 ahead.

3           MR. PENNY: The allegation was that there were  
4 undefined terms in the settlement agreement, and as it turned  
5 out, there weren't any undefined terms in the settlement  
6 agreement itself. It was in the form of the special election  
7 letters. I think the real complaint was the special election  
8 letters didn't include all the information for each individual  
9 class member and for those to be distributed to the class prior  
10 to their decision on whether to opt out.

11           We talked a little bit this morning about the *Lumber*  
12 *Liquidators* case and how it is not uncommon, in fact -- not  
13 uncommon for non-complete information to be given to the class  
14 before they have to decide whether to opt out or object. The  
15 reason for that is that the Agulnicks are trying to put forth a  
16 standard for what the notice -- how complete a notice must be  
17 that just doesn't exist.

18           Their standard seems to be based on contract law  
19 principles, but contract law principles are not at play here.  
20 Due process principles are. That is because the operation of a  
21 class-wide relief and the decision on whether class members are  
22 bound by the settlement or the judgment or not are an operation  
23 of the Federal Rules of Civil Procedure, not contract law  
24 principles.

25           It is Rule 23(b) -- excuse me, it is Rule 23(c) that

1 says that for any class that is certified under Rule 23(b)(3),  
2 like this one would be, the judgment is binding on all class  
3 members. The judgment includes the release.

4 So the issue is not whether class members have been  
5 given full and complete disclosures as in forming a contract.  
6 The issue is whether the notice program complied with due  
7 process, and, here, we had explained that it did.

8 It's also --

9 THE COURT: So the issue is do the options have to be  
10 spelled out specifically before somebody has to opt out.  
11 That's the first objection; right?

12 MR. PENNY: Right, Your Honor. And there's just no  
13 case law to suggest that that is the truth. And, in fact, that  
14 can be highlighted by the fact that the Agulnicks haven't cited  
15 to any case dealing with a class action opt-out or release.  
16 All the cases they cite for this proposition that this release  
17 is part of an agreement to agree deal with actual contract  
18 formations, not with the operation of a class-wide relief.  
19 Release, excuse me.

20 It's also important to note that the reason contract  
21 law principles aren't at play and due process principles are is  
22 because it is often impractical to provide complete exact  
23 information to the class prior to final approval. And that is,  
24 in fact, the case here. It would be impractical, unnecessary,  
25 wasteful, and confusing to try to give each individual class

1 member its special election letter before the settlement is  
2 finally approved.

3 THE COURT: Well, you say that, but how much would it  
4 cost to do that? There's no record that I know of to tell me.  
5 They have 207,000 people. They have files on every one of  
6 them, know exactly what they are. I cannot -- I don't want to  
7 say I can't envision, but I would rather much expect that  
8 Genworth has pretty well figured all this out before they  
9 agreed to the settlement, and, if not, afterwards. So they  
10 pretty well know, you know, what kind of -- who is going to get  
11 what letter, don't you?

12 MR. PENNY: Here's the point: They have a sense for  
13 what the settlement will cost them based on some of the  
14 analysis we did before, but going through the process of  
15 creating the letters will require a number of different teams  
16 within Genworth to create entirely new programs to interface  
17 different software programs and start generating these letters.  
18 Genworth is probably better equipped to talk about that.

19 THE COURT: They're going to have to address that  
20 because I don't understand -- you have five options, you know  
21 who the insureds are. On the surface, it seems rather  
22 reasonable to me to say, all right, given the variations in  
23 these options and the costs and the benefits, and there are  
24 benefits to every one of them, but there's also a cost-benefit  
25 analysis that needs to be conducted, and that is what's the



1 benefit of this choice, option one, versus all the others,  
2 because you're going to pay an increased premium, or if you  
3 take the nonforfeiture option.

4 Why don't I hear from Genworth on that point and see  
5 what the problem is. Maybe now is a good time, and then you  
6 can come back and do the rest of it.

7 MR. PENNY: Sure. When I come back after they  
8 address the cost of it, there are other issues about what the  
9 effect of this letter would be, how confusing it would be,  
10 etcetera. I just want to tag on top of that.

11 THE COURT: You'll have a chance. I don't have  
12 anything in the record about how hard it would be to generate a  
13 letter giving the details of the option to Mr. and Mrs.  
14 Agulnick and, *a fortiori*, to all 207,000 class members.  
15 Certain aspect of logic tells me it might be complex. Another  
16 application of logic may suggest that it's -- with the aid of  
17 computers, it's not really all that difficult. I don't know  
18 one way or the other. All I have are his assertions and yours.  
19 Where does that leave me?

20 MR. DUVALL: Your Honor, I can address the difficulty  
21 of doing this and, frankly, more importantly, the timing  
22 reasons why it shouldn't be done in this matter, but I'll take  
23 Your Honor's question first.

24 As to the difficulty of doing this, Mr. Penny already  
25 reviewed. In order to get these special election letters out,

1 Genworth has to reprogram several systems and then link up  
2 those systems, accounting systems, policyholder administration  
3 systems, customer service systems.

4 The time to take that from now until final -- let me  
5 amend that. I don't mean now as of July 13th. I mean when  
6 we're at a point where we can do this, and I'll explain what I  
7 mean in a second. This is an estimated build-out of three more  
8 months and a million dollars in cost. Please let me tell you  
9 why it's not a good idea to do that now --

10 THE COURT: Wait a minute. Let me see if I can get  
11 you. You can accomplish all that's necessary to do that by  
12 incurring an expense of \$1 million over a period of three  
13 months. Is that what you just said? I'm having trouble  
14 hearing you, so if that's what you said, tell me.

15 MR. DUVALL: That is what I said with the very  
16 important caveat that we're only able to take that process and  
17 move it forward if we have finality of the settlement, and let  
18 me explain what I mean by that. The issue with providing  
19 settlement class members with that information now and all at  
20 once is that it will be confusing, that it will be subject to  
21 change, and that it will not be something that the class  
22 members can get meaningful feedback on from Genworth.

23 THE COURT: You used the pronoun it will be. What is  
24 the "it" in that sentence?

25 MR. DUVALL: If a special election letter went out to

1 all 207,000 class members right now before final approval,  
2 that's the "it." The reason that that is premature is that the  
3 class members who would be receiving that would be looking at  
4 this special election letter that they can't actually elect  
5 from because it hasn't been approved by Your Honor, it hasn't  
6 gone through the filter of that particular class member's state  
7 regulator as to whether that can go out, and, very importantly,  
8 that class member's particular policy, his or her premiums and  
9 his or her benefits may change between now and that time period  
10 when they actually can elect a special election option, and  
11 they can change for several reasons, one of which, as Mr. Penny  
12 has over viewed, is because class members may be currently  
13 adjusting their policies, adjusting their premiums, and so the  
14 menu that's put in front of them now wouldn't be the menu that  
15 matches what's actually available to them when this settlement  
16 is final because of changes they make in between.

17 Another reason is that premium increases may be  
18 approved in their state and implemented. So the actual value  
19 of that cash component, the corresponding paid-up benefit may  
20 be different between now and the time that they can elect.

21 THE COURT: If there's an increase, will those  
22 benefits be greater or lesser?

23 MR. DUVALL: The settlement benefits would be greater  
24 because with respect to the paid-up benefits, it's going to  
25 capture those additional payments. So, in other words -- and

1 that's exactly the point. We need to give the class members  
2 current information at the time they can make the election,  
3 and, right now, it's just premature.

4 Now, I mention the ability of class members to get  
5 meaningful feedback. Genworth sends its policyholders rate  
6 action letters -- by rate action, letters about their premium  
7 rate increases -- throughout the year, and Genworth has been  
8 doing this for several years.

9 Genworth spreads those communications out to  
10 policyholders based on their policy anniversary date, and it  
11 does that so that a bunch of policyholders don't get the same  
12 letter on the exact same day, and a big part of the reason for  
13 that is because those policyholders, as we expect the class  
14 members to do, will want to call in to Genworth and talk about  
15 what their current policy looks like and what it may look like  
16 if they make some changes.

17 If we send 207,000 of these letters, which, again,  
18 are incomplete and subject to change, out now, it's going to  
19 overwhelm customer service such that the class members aren't  
20 going to be able to get meaningful feedback. That's on top of  
21 this information being incomplete and, perhaps, confusing to  
22 many class members for that exact reason.

23 Your Honor, this is why the parties -- we did think  
24 through this in crafting this settlement. In the settlement  
25 agreement, it's paragraph 44C of the settlement agreement, we

1 provided that the special election letter would be sent by  
2 Genworth after it had time to properly prepare its systems for  
3 the mailing, processing, and servicing of those letters and  
4 after the final settlement date for exactly this reason.

5           Likewise, paragraph 44D is that the letters may be  
6 sent by Genworth not at all at once even in one state, let  
7 alone all the states, but over the course of the year tied to a  
8 date off of policy anniversary date, six to eight months.  
9 Again, we really tried to think through these issues as to what  
10 would be best for the class and what would get them this  
11 information in the most effective way they can use it.

12           Just a couple final points on this, and then I'll  
13 turn it back over to Mr. Penny. Class members, before they  
14 elect these options, if they want to elect an option, they'll  
15 get the information tailored to them. So it's not that they're  
16 never going to get the information. They're going to get the  
17 current information at the time they need it.

18           The final point I'll make on this, unless Your Honor  
19 has questions, is if we do what the Agulnicks are proposing and  
20 send out these notices now, which we -- just to be candid, we  
21 just can't do it, but if we were to, it would just delay  
22 getting these settlement benefits out to the class. It will  
23 just back this up even further, and that's certainly not what  
24 we want to do --

25           THE COURT: Why will it delay?

1 MR. DUVALL: Because the premise being that we have  
2 to do this before final approval in order to get, essentially,  
3 effective opt-outs, and, by the way, that's not something  
4 that's required by Rule 23. Mr. Penny has noted similar cases.  
5 Rule 23 does not require this. This is an opt-out settlement.

6 But if we're to take this additional step, which,  
7 again, we can't agree to it and it's not something that would  
8 be in the interest of the class, Genworth's policyholders, we  
9 would just be -- theoretically, we'd just be pushing out, then,  
10 the finalization of this and getting the benefits actually out  
11 to the class in the time that they could actually use these  
12 settlement benefits, and unfortunately --

13 THE COURT: Stop a minute. A somewhat related issue  
14 is why can't -- what's the impediment to taking the proposed  
15 settlement agreement to the 50 regulators, letting them decide  
16 if they -- that there's a problem and then having the approval  
17 occur after I know what the regulators are doing?

18 I'm concerned about that because of this letter from  
19 California in which that regulatory agency suggests that it may  
20 not -- it may want a different result for its insureds. That's  
21 rather much how I read what that letter says.

22 I don't know how I can do that. I don't know how I  
23 can say a settlement is fair when there are several thousand  
24 insureds in California, and they may get a different outcome  
25 than the insureds in Virginia or Maryland or South Dakota. So

1 how do we deal with that situation?

2 MR. DUVALL: Deal with that situation, Your Honor, as  
3 Rule 23 allows and how other cases have dealt with it. Your  
4 Honor can give final judicial approval to the proposed class  
5 action settlement as fair, reasonable, and adequate, and then  
6 we, Genworth, as a regulated entity -- and the fact is the law  
7 is Genworth is regulated as an insurer in 50 states, and each  
8 of those 50 states has and can right now and can tomorrow  
9 regulate the communications that go out to its policyholders.

10 That's a necessary part of this, but you can give  
11 your stamp of final approval on the fairness of this  
12 settlement, and then we can go out and implement it. I know  
13 that the brief that the parties jointly filed cited several  
14 cases in which courts have granted final approval of settlement  
15 terms as fair, adequate, and reasonable that had provisions to  
16 the effect that regulators in a particular state could  
17 eliminate the relief to class members. Those settlements  
18 are -- have been approved.

19 Here, we have actually had six months --

20 THE COURT: I can't understand how anybody could do  
21 that, any judge could do that if somebody, some regulatory  
22 agency can take away the benefit conferred by the settlement.  
23 I don't see how a court can do that.

24 MR. DUVALL: Your Honor, the *Motor Fuel Sales*  
25 *Practices* case, District of Kansas affirmed by the Tenth

1 Circuit, *Dickman* case in the District of Maryland, the *Feller*  
2 case in the Central District of California, all of these were  
3 cited in the joint papers. They involved that scenario of a  
4 settlement being approved and the regulators could essentially  
5 take that relief, and I'll give you an even broader example  
6 from the Fourth Circuit. The *Berry* case, which I know the  
7 parties have cited for a number of propositions --

8 THE COURT: What case?

9 MR. DUVALL: It's a case called *Berry*, B-e-r-r-y.  
10 The specific citation I'm referring to is 807 F.3d at 616. In  
11 that case, the settlement, the only relief provided by that  
12 settlement was that the defendant would change its background  
13 check product, FCRA case. No monetary relief, no anything  
14 else.

15 The settlement provided that the defendant, after  
16 final approval, could implement changes over time to respond to  
17 the then current requirements of the -- of customers and the  
18 market. It has nothing about regulators. My point is, that  
19 was a far broader essentially discretion of the defendants to,  
20 after final approval, change the terms of the settlement. The  
21 Fourth Circuit, over objection, approved that settlement.

22 I just point that out because that's even beyond  
23 these other cases that we cited to Your Honor that allow  
24 regulators to have essentially control of what happens in their  
25 states following the final approval of a settlement.



1           THE COURT: That wasn't a regulator. That was the  
2 entity in the -- that was attendant in the case, and they had  
3 to change it to be consistent with the ultimate outcome of what  
4 the settlement was. They couldn't diminish the amount of the  
5 settlement by doing that. They couldn't take away in the *Berry*  
6 case. They could only conform to the law.

7           And, here, California has signaled that it's not  
8 going to go along with your plan. That's what bothers me.  
9 What page is that -- 37 of ECF number 177. "Class members  
10 should not be asked to take reductions to their policy benefits  
11 that are disproportionate to the proposed cost-savings and  
12 settlement compensation." And then it is later said, "The  
13 CDI," which is California Department of Insurance, "is  
14 concerned that" quote, quoting this department, "plaintiffs do  
15 not provide an assessment of the value of the benefits that  
16 class members must forfeit pursuant to any special election  
17 option and do not weigh the value of those forfeited benefits  
18 against the value of the reductions in premium, damages  
19 payments, or enhanced paid-up benefits that class members would  
20 receive." In fact, the CDI said that it was concerned that the  
21 "proposed settlement may induce policyholders to forfeit policy  
22 benefits that are worth substantially more than the  
23 compensation they would receive and, conversely, that the  
24 settlement could provide Genworth with a windfall if reductions  
25 to future claim and reserve obligations greatly exceed damages

1 paid."

2           The natural reading of the articulated view of the  
3 California Department of Insurance is that the approach that  
4 has been outlined here is not going to cut it in California.  
5 Now, I realize they didn't file any objection, but, you know,  
6 it seems to me that what they did in doing that is a rather  
7 clever way to keep their options open. Because if they filed  
8 an objection, and it had been overruled, then the parties could  
9 have shut them down if, during the regulatory process, they  
10 tried to achieve what they had set out to do in the litigation  
11 and the objection but had lost.

12           So, obviously, they're keeping their hand open to  
13 achieve, or be able to achieve, what it is that they haven't --  
14 that they have expressed concern over. And if that happens,  
15 then -- how many California people are there? How many  
16 policyholders are there? I've forgotten.

17           MR. DUVALL: I don't have the number --

18           THE COURT: She has it.

19           MR. DUVALL: I have the percentage.

20           THE COURT: How many is it?

21           MS. LUO: Your Honor, it's 39,814.

22           THE COURT: 39,000 out of 207,000. That's a lot of  
23 people. They have 39,000 people that are going to get --  
24 they're going to get an explanation that's far different than  
25 what the other 160,000 people are going to get, and that could

1 be -- make a big difference, I would think. So how do I deal  
2 with that?

3 MR. DUVALL: I'll take head-on the questions you just  
4 raised about California, and then I do want to go back to,  
5 though, how the sequence of the settlement is unaffected.

6 California policyholders aren't going to get a  
7 sweetheart deal. They're not going to get more relief, they're  
8 not going to get more material benefits under this settlement  
9 than are the other states. We represented that in the papers.  
10 I represent it again to you now. We've made the representation  
11 to regulators. This is not a situation where we're going to go  
12 out and let us state, negotiate an additional material benefit  
13 for its policyholders. It's not going to happen.

14 THE COURT: That depends on how you define that  
15 benefit. For example, do you define in that benefit a more --  
16 a cost-benefit analysis of the type suggested in paragraph --  
17 in page 37?

18 MR. DUVALL: That benefit to be -- to take that head  
19 on, it's not a benefit. From our point of view, from  
20 Genworth's point of view, and it will be discussing this with  
21 California, that is not a good idea for policyholder class  
22 members.

23 To step back, this case is about policyholders being  
24 given the choice to lower or reduce their premium payments for  
25 their long-term care policies, and those premium payments have

1 increased over the years, and we recognize that policyholders  
2 may not want to pay those increased premiums for a variety of  
3 reasons.

4 So what this lawsuit tries to achieve and what the  
5 settlement tries to achieve is to allow policyholders the  
6 ability to reduce or even stop paying those premiums based on  
7 the information that the plaintiffs alleged in this lawsuit was  
8 material to that decision. And if they do, we treat them,  
9 these electing class members, as if they had made that decision  
10 earlier by putting those cash payments back in their pocket.

11 That's what this settlement is about. It's about  
12 reducing premiums. It's not about this actuarial equivalence  
13 of values of the benefits that are being reduced, and they're  
14 not being forfeited, by the way. They're being reduced in  
15 order, again, to get the premiums down.

16 THE COURT: Sounds logical to me, but suppose  
17 California Department of Insurance doesn't agree with you?  
18 You're going to issue a letter here. The letter you're going  
19 to issue is going to have in it the following: It's going to  
20 have an assessment of the value of the benefits that class  
21 members must forfeit pursuant to any special election option  
22 and an explanation about the value of those forfeited benefits  
23 weighed against the value of the reductions in premium, damage  
24 payments, or enhanced paid-up benefits that class members would  
25 receive.

1           To me, that would be a very helpful kind of thing, if  
2 I were making this decision, to have that information. But in  
3 the ordinary course of the insurance policy, if I want that, I  
4 have to go out and pay somebody to prepare that analysis for  
5 me. These people who wrote this, and why, I don't know, but  
6 they're saying that in order for them to sign off on this,  
7 that's going to be on the table for discussion. They're not  
8 saying they're going to do it, but they're saying it's on the  
9 table for discussion.

10           And if it's on the table for discussion and is  
11 discussed and had it been done before it came here today, I'm  
12 not -- I don't think I can approve the settlement as fair,  
13 reasonable, and adequate if one group of consumers  
14 representing -- what is that? It's over ten percent of -- what  
15 is it? My math is not that good. What did you say it was?

16           39,000 people, 37,000 people out of 207,000 get that  
17 kind of deal and the others are not going to get it, what you  
18 are doing is for those California people, you're saying those  
19 insureds get a free analysis to look at whereas the people in  
20 Virginia and Maryland have to go out and pay somebody to do  
21 this analysis in order to exercise the option. That's the  
22 functional effect of this particular provision.

23           And they think that's important to avoid inducing  
24 policyholders forfeiting policy benefits that are worth  
25 substantially more than the compensation they would receive or

1 that it would give Genworth some kind of windfall. To me, it's  
2 a very troublesome part of this whole thing.

3 I was involved years ago in a case in which the  
4 parties reached a settlement. It wasn't a class case, it was a  
5 multidistrict case and involved a number of different  
6 utilities. And the utilities were regulated industries, and  
7 because the settlement would have an impact upon the economic  
8 situation of the utilities and, perhaps, even provide the basis  
9 for pass-through of some of the cost to the ratepayers, it all  
10 had to be approved by the ratepayers in 15 different -- 13  
11 different states.

12 The judge gave tentative approval to the settlement  
13 agreement and the terms that were there and said, you take that  
14 to the rate people, and when you get the rate people's approval  
15 and it has finished, I will bless it finally, and it had to be  
16 approved by the Court for reasons I can't recall. Why wouldn't  
17 that approach work here?

18 MR. DUVALL: If we undertook that approach here, we  
19 would not finish that regulator engagement process in any time  
20 soon enough to get this relief out to the class. This would go  
21 on far, far longer than any of us would want it to, and it  
22 would delay getting these benefits to the class.

23 THE COURT: Excuse me a minute. Think through what  
24 you just said. This process is going on with the regulators if  
25 I approve it. And it's going to take the same time for the

1 regulators to act whether you're doing it contingent upon an  
2 ultimate finding here or after their action as it is if I sign  
3 off on it today and then they are going to act.

4 So what you're telling me is that either way -- at  
5 least I understand what you say -- the consequence of what you  
6 are saying is that either way, this approval process is going  
7 to take a long time and, in your words, keep the distributions  
8 from going to the policyholders.

9 Now, if that's the case, I'm not sure how fair,  
10 reasonable, and adequate this settlement is.

11 MR. DUVALL: What I am telling you, Your Honor, is  
12 that if we have to go out and complete that regulator review  
13 process before this Court gives its stamp of a final approval,  
14 that will take far too long.

15 THE COURT: How long? How long will it take?

16 MR. DUVALL: I can't give you an answer for that.

17 THE COURT: Excuse me, but you have people who deal  
18 with these insurance people every day --

19 MR. DUVALL: Uh-huh.

20 THE COURT: -- every month, and you know what the  
21 process is, and you know how long that takes, and you ought to  
22 be able to tell me. You may not, not you and your firm, but  
23 your client does, and it may not -- you may not be able to say  
24 it with any precision, but you certainly can provide me the  
25 information, and given what you just told me, you are going to

1 provide me the information before I do any further approval of  
2 this case, because what you have just told me is that even if I  
3 sign off on it today, it's going to take a long time to get it  
4 done, and I don't think that's right.

5 MR. DUVALL: Please hear me out, Your Honor. That's  
6 not quite what I'm saying.

7 THE COURT: Forget about what you are saying for the  
8 time being. Have your client get started today giving me  
9 answers on how long it's going to take to get this regulatory  
10 approval process going given what has to be done in each state.

11 In Virginia, for example, you have to issue X, a  
12 statement on X, and then the commission has Y time to react to  
13 it and then citizens have Z time and then the general  
14 history -- there's no terminal date to it, but the general  
15 history says -- Virginia Power, for example, is that they  
16 approve or disapprove rate increases in three months or four  
17 months or whatever.

18 That seems to me to be information your client  
19 certainly is bound to have, but, again, I don't want to be like  
20 Judge Warner and presume that the Prussians kept marching  
21 orders for the Franco-Prussian War and then be reversed because  
22 of it, but it stands to reason that the company would have this  
23 kind of basic information available to it and it could be  
24 provided.

25 MR. DUVALL: Here's the point I'm trying to make,



1 Your Honor: If these sorts -- if this sort of process plays  
2 out where the Court has not given final approval to the  
3 settlement, and, instead, we come back to this Court with any  
4 particular modification of a regulator to the special election  
5 letter, any tweak, and we have to get those wrapped into the  
6 final approval process, what will happen with the states is  
7 that then there will be this piling-on effect where some states  
8 may say, well, yeah, we want the modifications, too.

9 Some states may say we don't want that modification,  
10 and we have to sort all that as part of the final approval  
11 process. There will be this basically hamster wheel effect of  
12 trying to synthesize all of these different 50 state regulator  
13 changes as part of final approval.

14 THE COURT: Has that ever happened?

15 MR. DUVALL: That's what -- I'm telling you that's  
16 what --

17 THE COURT: Has it ever happened? Is there any basis  
18 -- is there any basis to believe that that scenario would  
19 occur?

20 MR. DUVALL: Yes. I am relaying to you, Your Honor,  
21 the client's experience in dealing with its 50 different state  
22 insurance regulators, and the reality is they are regulated by  
23 50 different states' Department of Insurance.

24 California filed a statement in this case. No other  
25 regulator even filed a statement, and no regulator objected. I

1 know Your Honor said that, well, maybe they were being clever,  
2 but the notice of this settlement went out to every state's  
3 regulator, not just 90 days in advance of when an objection was  
4 due to be filed but 180 days in advance, and these regulators,  
5 they know how to object to a settlement. None of them objected  
6 to the terms of this settlement as unfair or unreasonable.

7           Moreover, Genworth has engaged with many of these  
8 regulators already about this settlement, and I can represent  
9 to you, they're encouraged by that dialogue. No regulator has  
10 told them we're not going to let you do this settlement, but  
11 the concern is that if we do this before the Court's final  
12 approval, the back-and-forth process, and this is based on  
13 Genworth's experience in dealing with these regulators, and as  
14 you know, Your Honor, they do do this every month, every day --

15           THE COURT: Slow down.

16           MR. DUVALL: It will be a never -- I shouldn't say  
17 never. It will be a cycle that takes far longer to complete  
18 and to get out the terms of this settlement and the relief  
19 available in this settlement. That will take far longer than  
20 if, by contract, Your Honor gives its stamp of final approval.  
21 And we can take that stamp of final approval, your Court's  
22 imprimatur, and we can take it out to the states and say, here  
23 is the settlement whose terms have been approved by the Eastern  
24 District of Virginia as fair, reasonable, and adequate. These  
25 are the terms that we think should go out in your state.

1           That's going to be in our experience, Genworth's  
2           experience, the best way to ensure that this settlement gets  
3           out consistently to class members across many states, the 50  
4           states, and gets out expeditiously. That's the best thing we  
5           can do to ensure that that happens.

6           THE COURT: That's an argument that says a federal  
7           court ought to issue an order that it has reason to believe can  
8           be adversely affected by the action of one or more state  
9           regulators which is inconsistent with what we have to do, I  
10          think.

11          MR. DUVALL: But, Your Honor, this is --

12          THE COURT: Let's go back a minute to Agulnicks'  
13          points. I digressed from that. They say that the letters  
14          ought to be generated before I approve it, and they ought to  
15          know what their choices are, and that seems to be what the  
16          California insurance commission is saying as well.

17          So you are telling me it takes three months and a  
18          million dollars to get the letters ready. Is that where we  
19          are?

20          MR. DUVALL: Very importantly, from a certain point.  
21          We have to get this up to a point at which, then, that step can  
22          be achieved, and if we were to do that now, if we were to send  
23          all these letters now, again, it would be incomplete  
24          information, it'd be subject to change.

25          Class counsel, who represents these 200,000 class

1 members and has spoken to over 4,000 of them, doesn't think it  
2 would be a good idea. It would be confusing to them. They'd  
3 be looking at an election form that they can't even make an  
4 election on. It would be more harmful than helpful to the  
5 class, and it would also just not --

6 THE COURT: Wait a minute. How can they not make an  
7 election on it?

8 MR. DUVALL: Because Your Honor won't have given  
9 final approval to the settlement and because their state  
10 regulators wouldn't have given its sign-off in whatever form  
11 that may be to that letter going out. It wouldn't be a good  
12 idea either because of the -- that one-time overwhelming  
13 effect.

14 That's why I described how Genworth sends letters out  
15 to policyholders in a particular state over the course of a  
16 year. It doesn't send all the letters on the same day.

17 THE COURT: When are you talking about sending these  
18 letters out? If I approve it today, when would these people  
19 get these letters?

20 MR. DUVALL: If you approve it today, then what we  
21 can do is immediately get -- continue to push this through with  
22 the 50 states, and as soon as any particular state has, we'll  
23 say, signed off -- and that can take various forms, kind of  
24 formal or informal forms. As soon as they signed off, then it  
25 is that process I described of getting the systems up, ready,

1 and out.

2 THE COURT: You mean you're going to wait until you  
3 get 50 states signed off before you do the three-month work to  
4 integrate the system and spend a million dollars?

5 MR. DUVALL: That's not quite what I'm saying.

6 THE COURT: How about doing this: How about telling  
7 me specifically what you are talking about, because the more I  
8 hear about this, this is an excellent idea, excellent concept  
9 of a settlement that stands to be frustrated by a series of  
10 very convoluted implementation plans and state regulators.

11 So that's a terrible situation for the plaintiffs to  
12 be in and for the Court to be in, but I do have some control  
13 over whether the Court will be in it.

14 So how will this happen then? Tell me that. Let's  
15 assume Monday I have the order refined and entered and it's  
16 there. How long will it take, best judgment of Genworth, to  
17 get these election letters and damage payments out to the  
18 class?

19 MR. DUVALL: I truly am sorry, Your Honor. I cannot  
20 give you an answer for the entire class. What I can tell you  
21 is that we are obligated under the settlement agreement,  
22 Genworth is obligated under the settlement agreement to use its  
23 best efforts to get this out promptly, and it is already trying  
24 to do that.

25 In addition to the notices I described earlier,

1 Genworth held a 50 -- an open-to-all-50-states conference call  
2 with the regulators on this settlement. 33 of them  
3 participated in that. Genworth has engaged with an additional  
4 number of regulators directly one on one. It is trying to move  
5 this along. I can't tell you with certainty exactly when that  
6 will be finished, but I can tell you --

7 THE COURT: Give me your best judgment then, please,  
8 about how long it will take to get this -- get these people the  
9 benefits of this settlement. I'm sure that somebody at  
10 Genworth has noodled this some.

11 MR. DUVALL: I'm sorry, Your Honor. As I stand here,  
12 I cannot give it to you. I'm happy to confer during a break,  
13 but what I can tell you is that the quickest way to get this  
14 relief out and the best way to get it out as we've proposed in  
15 this settlement is to give final approval to the settlement,  
16 let us finish our work with the regulators, and then push those  
17 letters out in those states.

18 That will happen far quicker than if we have to go  
19 out -- if we have to either send class members an advanced  
20 special election letter that's not a special election letter  
21 now or if we have to complete all the regulator input before  
22 getting final approval. It's just going to add another layer.  
23 So I know that either of those would take longer.

24 THE COURT: Well, you know that, but I don't have  
25 anything in front of me to demonstrate that it will, and logic

1 tells me that it shouldn't. But I gave you another option, and  
2 that is that the Court says this settlement looks fair,  
3 adequate, and reasonable and is prepared to issue a final  
4 approval order within the meaning of the Federal Rules of Civil  
5 Procedure and enter judgment as appropriate as soon as all the  
6 regulatory people have signed off on it and there is no  
7 material -- without any material change to the agreement.

8           It seems to me to be that that would provide you a  
9 mechanism to tell the regulators that the Court -- if they  
10 don't tinker with it, that the Court is satisfied with it.  
11 Now, the problem is that that will delay an appeal, an appeal  
12 from Mr. Ferrara if his objection is overruled, appeal from Mr.  
13 Luck, an appeal from Mr. Jacobs, an appeal from the Agulnicks.

14           That will leave you open to that situation where  
15 these few people can frustrate the objectives that you are  
16 seeking to accomplish, and that, I think, you are both to be  
17 commended for.

18           That is a downside to it, because if I issue the  
19 final this week right away, then that is appealable, and you'll  
20 know that it's appealed within X period of time whereas if the  
21 approach -- you take the approach I suggest, then you may  
22 not -- you've got an added risk of delay. And I recognize  
23 that's a problem, because I have seen situations in which  
24 objectors have used that as a way to leverage getting paid off.

25           However, in this settlement, that can't happen. All

1 it does is cause delay. There will be no blackmail associated  
2 with it. Maybe I'll let you talk --

3 MR. DUVALL: Thank you, Your Honor.

4 THE COURT: -- people have break and see, and maybe  
5 we have to take a recess and come back another day. I need to  
6 hear from the Agulnicks and Mr. Penny and you both -- if you  
7 have anything else to say, I'll be glad to hear you on their  
8 objection before I hear him.

9 MR. DUVALL: Just very briefly on the scenario you  
10 just raised, two points, Your Honor. One, we thought through  
11 this and worked with our client and its representatives who do  
12 engage with the departments of insurance across the country,  
13 and I am representing to you based on that input and on the  
14 very thoughtful input from that that shaped this settlement,  
15 that the best way to get this relief out as is and quickly is  
16 to do the regulator engagement after final approval, not  
17 before. If we do it before, it's just going to create far more  
18 time.

19 Point number two to Your Honor's proposal, we cannot  
20 agree to that for the reason I just stated. What -- I think a  
21 slightly different way to get about to the same point is --  
22 again, we represented, representing again to you now, Genworth  
23 is not sweetening the pot for any particular state. Not  
24 happening.

25 This Court, of course, after final approval, will



1 have continuing jurisdiction over this settlement. If an issue  
2 comes up with a particular state that we need the Court's input  
3 on, we can bring it to you as part of that implementation and  
4 administration phase, the continuing jurisdiction. But having  
5 your Court's stamp of approval on before we go out and do that,  
6 that will help get that settlement implemented in those states.  
7 If we need to talk to you about something, we can do that under  
8 your continuing jurisdiction. That's, we think, the best way  
9 to handle this.

10 THE COURT: Well, nobody gets any benefits then for a  
11 year, six months, how long? Let's suppose -- *Kokkonen*, I  
12 retain jurisdiction to administer the settlement agreement, to  
13 resolve any disputes that arise under it from any member of the  
14 class individually, from any objector, from the plaintiffs'  
15 counsel, and how does that work? I don't know, but let's  
16 suppose that I do that. Then what happens? How quickly do  
17 these people get anything?

18 MR. DUVALL: Quicker than any other way we've  
19 proposed again.

20 THE COURT: I want you, when you talk to your people,  
21 to find out what we're talking about.

22 MR. DUVALL: I will ask them.

23 THE COURT: If these people are savvy enough to form  
24 a hamster wheel theory and to have all the knowledge that you  
25 say they have and to believe that this is going to happen and

1 to deal with these people, surely they can give me that  
2 information. If they can't, I begin to doubt whether or not I  
3 should rely on anything that comes from them.

4 And that also then brings up the question the extent  
5 to which the attorneys' fees get paid. Why should any  
6 attorneys' fees get paid until these people get paid at all? I  
7 have the need to sort through that. That's one objection I  
8 believe one objector made. All right --

9 MR. DUVALL: I'm sorry. Obviously the Court wants to  
10 take a break. I do want to respond to the Court's essentially  
11 one point you just made. Obviously Mr. Penny will speak to his  
12 attorneys' fees and the timing of that, but if you'll just  
13 indulge me, the way that this could work, Your Honor, and,  
14 again, we think work best this way, you --

15 THE COURT: Whoa, whoa. I didn't -- if Ms. Peterson  
16 got that, I'm going to give her an award. I'm going to give  
17 her whatever she wants.

18 MR. DUVALL: You grant final approval, we go out to  
19 the states, we give you, under your continuing jurisdiction, a  
20 status report. Let's say that status report is -- let's say  
21 it's 90 days from now. To be clear, I can't represent that,  
22 but let's say it's 90 days from now, and we tell you, Your  
23 Honor, in 33 states, letters going out exactly as is. We're  
24 having discussions with the other 17.

25 Another 90 days after that, letters going out in 49

1 states, Your Honor, and this state moved one sentence around.  
2 It took a sentence from the third paragraph and put it in the  
3 second paragraph, and we'd update you on that. And if there is  
4 -- again, we don't expect there to be, but if there is an issue  
5 that we need to talk about with this Court, if we're at an  
6 impasse with whatever state, then we can talk about it. That's  
7 how I'm envisioning -- that's how we're envisioning it working,  
8 and we think it could work.

9 THE COURT: I understand that. You can talk about  
10 it, you can raise it here. You two are properly before the  
11 Court. The person whose, to quote Judge Williams, head needs  
12 to be knocked is not. The regulator is not before the Court.  
13 There's nothing I can do except what?

14 I realize -- what you are saying, in essence, is that  
15 ultimately I may end up being called upon to adjudicate some  
16 change, some change in the letter or some proposed change in  
17 the terms. I don't think I have authority to do that under the  
18 rate amendment doctrine, and so I don't know what good that  
19 accomplishes, I guess is what -- the concept is good. When I  
20 reflect upon its execution, I don't know what good it will  
21 achieve, and maybe you can explain that to me.

22 MR. DUVALL: I'm happy to get back up here after the  
23 break or keep going right now. The reason that this concept is  
24 good -- Your Honor, you are right. You and we, we can't  
25 control the extent of the regulators' jurisdiction over

1 communications that go out to their particular state's  
2 policyholders, but under Rule 23, your solicitation of the  
3 regulators' input has already happened. That was the CAFA  
4 notice process, and we sent it again and gave them 180 days,  
5 and all you got was one statement -- I'm sorry. I'm getting  
6 dry.

7 The CAFA notice process is designed for regulators to  
8 give the Court its -- their input on the terms of the  
9 settlement and the fairness of that settlement, and that has  
10 occurred. You received one statement from the California  
11 Department of Insurance. No objection to the fairness or  
12 adequacy of the settlement. That's what the Court needs under  
13 Rule 23 and under CAFA, under 28 U.S.C. 1715 --

14 THE COURT: Slow down.

15 MR. DUVALL: 28 U.S.C. 1715 --

16 THE COURT: Stop just a minute. They get the notice  
17 and part of the Class Action Fairness Act notice. They're  
18 given a chance to say something. In the process, you go back,  
19 and they want to change things. Are they estopped because  
20 they've gotten notice and done nothing from exercising their  
21 authority, changing things?

22 I think no, they are not. That's just a notice  
23 provision, and the fact that they didn't say anything doesn't  
24 have any consequence with respect to estoppel. And I think  
25 there's a reason for that, and that is that it's up to the

1 state regulators to decide these things, and it's appropriate.  
2 Let's take a recess of 20 minutes, and then we'll talk.

3 MR. DUVALL: Thank you.

4  
5 (Recess taken.)

6  
7 THE COURT: All right, Mr. Duvall, let me ask you  
8 something. You all, I'm sure, check this out. Are you  
9 familiar with any other class action that has been certified  
10 under circumstances similar to this that I could go to and look  
11 at as a guide to see how best to proceed? You all didn't cite  
12 anything.

13 MR. DUVALL: That you could look at as a guide?

14 THE COURT: Yes. You all -- this is a case where you  
15 are proposing a class and the certification of a class action  
16 when the implementation of the class order, settlement, can be  
17 affected by subsequent actions of regulators in such a way as  
18 to affect the fairness, reasonableness, and adequacy of the  
19 class -- of the settlement.

20 And I just don't see any cases in any of the papers  
21 where that issue has been discussed or analyzed. I've sent for  
22 Newberg on Class Actions to see if I can find anything on it,  
23 but nobody sent it to me unless I've completely missed it in  
24 the papers, and if I have, I apologize. Do you know of any  
25 case?

1 MR. DUVALL: The best cases I can cite Your Honor to  
2 is the *In re: Motor Fuel Sales Practices* case, District of  
3 Kansas affirmed by the Tenth Circuit, the *Dickman* case out of  
4 the District of Maryland, and the *Feller* case out of the  
5 Central District of California. Those were cited in our joint  
6 brief on the sequencing of regulator approval after final  
7 approval, and, in those cases, regulators could strike relief  
8 available to class members in their states, and that settlement  
9 was still approved.

10 What we're proposing here is an additional,  
11 essentially, check where this Court will have continuing  
12 jurisdiction, and we will report back to the Court on periodic  
13 periods. And one point of clarification, a number of my  
14 colleagues told me that I did not explain this well, so please  
15 let me clarify.

16 When a state signs off on the special election  
17 letter, assuming final approval has been granted, and then we  
18 take it to the state and that state says that letter can go  
19 out, those letters will start going out in that state. We're  
20 not going to wait for all 50 states to then start mailing the  
21 letter.

22 THE COURT: I understand that.

23 MR. DUVALL: I was told I did not do a good job in  
24 explaining that. If, in the, again, unlikely event -- because  
25 Genworth has engaged its regulators already, it has tried to

1 get feedback, and it's going to try to get this settlement  
2 implemented exactly as we have proposed, if any state proposes  
3 and insists on a material addition to that settlement  
4 agreement, I represented to you we're not going to agree to it,  
5 but in the event that we are stuck with a state, we can come  
6 back to Your Honor and report to Your Honor in 33 states those  
7 letters have gone out as is, no problem. 17 states we're still  
8 having discussion. Fast forward, in 49 states those letters  
9 have gone out as is. In this one state, we've got this issue.

10 We could put to Your Honor, would it be acceptable to  
11 Your Honor for Genworth to implement the settlement in this  
12 manner. One tweak I would give to Your Honor's question, the  
13 settlement itself right now can be found to be fair,  
14 reasonable, and adequate. The standard under Rule 23 is  
15 whether the settlement proposal, in its terms, are fair,  
16 reasonable, and adequate.

17 If, down the line, there is an issue that has become  
18 an issue with any particular state about the implementation of  
19 that settlement, we can come back to Your Honor and essentially  
20 say, can Genworth do this, do you think that this is consistent  
21 with the terms of this settlement, Your Honor, do you think it  
22 would be equitable as to these class members in this particular  
23 state which I note, by the way, would follow, as the settlement  
24 agreement requires, involvement of class counsel, that Genworth  
25 make its best efforts to implement the settlement as is, that

1 Genworth acts in good faith in doing so.

2 That's the process we envision. I cede to Mr. Penny.

3 Thank you.

4 MR. PENNY: All right, Your Honor, I think my  
5 function now is to pick back up with Agulnick, but is there  
6 more that you'd like to hear from plaintiffs on the regulatory  
7 issue before I do that?

8 THE COURT: I still want you to go check -- I don't  
9 think that *Dickman* is very helpful. I don't think it's  
10 analogous, and, actually, I don't think the *Fuels* case has much  
11 to do with it either, because in those cases, it was just an  
12 acknowledgment. There was a statement, unless the regulatory  
13 says no, you can't do it. There wasn't an active pending  
14 approval process, and there wasn't a letter in the file by one  
15 of the regulators that criticized what you were doing, what was  
16 being done in that case. So I don't think that helps a whole  
17 lot. That's sort of general perforatory language, we're going  
18 to do it unless the regulatory agency says otherwise.

19 MR. PENNY: I understand your point.

20 THE COURT: And the other one, the *Fuels* case had to  
21 do with whether you could buy the product, but in some of the  
22 places where the defendant -- the plaintiff and the defendant  
23 operated, the class members and the defendant operated, the  
24 state regulatory agency hadn't approved yet the sale of the  
25 product.



1           That's far different than the situation we have here  
2 as far as I can tell. So I still -- I don't know what I'm  
3 going to do. I may require you to address it further, but I  
4 think we've slogged that horse about as much as we can now at  
5 this point. So if you have anything else to say about  
6 Agulnicks --

7           MR. PENNY: Yes, Your Honor. Where I left with  
8 Agulnicks was a discussion about the impracticality of creating  
9 these sort of tentative but more final special election letters  
10 and sending them to class members before they had to opt out.  
11 And I think, as elucidated by this conversation we've just had,  
12 one of the major issues with that type of a process would have  
13 been either offending or having to get regulator approval for  
14 the tentative letters that would be going out.

15           We'd have this very same issue if we had to send  
16 class members their special election letters now without or  
17 with the imprimatur of regulators.

18           THE COURT: The letters I get from my insurance  
19 company have to be approved by the State Corporation  
20 Commission, do they?

21           MR. PENNY: This is going to sound like a  
22 distinction, hopefully, with a difference, but the way I  
23 understand it, regulators don't necessarily have to approve  
24 every communication, but they have the right to comment or ask  
25 for changes on policyholder communications, and the only reason

1 we are dealing with regulator issues right now in this case is  
2 because of the special election letter that will be sent to  
3 class members, a policyholder communication that will have all  
4 sorts of negotiated disclosures and benefit options to be made.

5 It's the same letter, basically, that we're talking  
6 about now having to do some sort of tentative approval before  
7 that letter is finalized to regulator's satisfaction. The very  
8 same issue would present itself if we tried do this before  
9 final approval.

10 The other thing which would be a concern about  
11 sending the special election letter in a tentative form to  
12 policyholders prior to final approval is the serious chance for  
13 confusion, because class members will get that letter and will  
14 think that it is a claim form that needs to be returned and  
15 that elections need to be made at that point in time.

16 And even if the letter specifically says that that is  
17 not what the letter is about, people will see a place for a  
18 signature, a place to check a box, and they'll send it back in  
19 thinking they've made their election.

20 THE COURT: You don't have to put the signature on  
21 it. You just put -- the letter will be sent in substantially  
22 this form, and the -- put on it the same thing that Blue Cross  
23 Blue Shield puts on all the stuff -- and Social Security  
24 inundate me with so that I finally realize in big letters, this  
25 is not a bill, you could say this is not something. I think

1 that that overstates the practical problem.

2 The real problem is that what he wants is for you to  
3 tell him what exactly the cash benefit is. What else would he  
4 have you -- would you have to tell him?

5 MR. PENNY: Well, importantly, one of the things that  
6 he made a point that he needs to be told before final approval,  
7 before his decision to opt out, is he said all the disclosures  
8 had to be filled out. The disclosures in the form letter  
9 that's posted on the website had little Xs as to the amount of  
10 future premium rate increases, etcetera. That presents a major  
11 problem that I don't think Mr. Dailey has considered yet which  
12 is known as the one-way intervention problem. That's  
13 recognized by the Supreme Court, and it arises --

14 THE COURT: You know, you learn something new every  
15 day. So help me with the one-way intervention problem.

16 MR. PENNY: The one-way intervention problem as  
17 recognized by the Supreme Court arises when class members might  
18 be able to partake of the benefits of a judgment or a ruling or  
19 a settlement of a class action without binding themselves to  
20 the result, the idea here being they would be able to get the  
21 disclosures, a primary feature of the settlement, and then  
22 decide whether to opt out. It could get the relief and not  
23 bind themselves. It's patently unfair.

24 THE COURT: I don't know that I've ever heard it  
25 called that, but why would that be the case since this is only

1 an exemplar?

2 MR. PENNY: No, he doesn't want just an exemplar. He  
3 wants the disclosures completed to tell him what the future  
4 rate increases will be, what Genworth's current --

5 THE COURT: Nobody ever knows what the future rate  
6 increases will be.

7 MR. PENNY: I think you are misunderstanding my  
8 point. The point I'm trying to make is the disclosures, one of  
9 the primary disclosures is Genworth will be telling  
10 policyholders not only what rate increases have already been  
11 approved but what rate increases Genworth is planning to  
12 request from their state's regulator over the next six to ten  
13 years.

14 That number, if it's filled in, is one of the primary  
15 disclosures. If that number gets completed in the special  
16 election letter that's sent out to class members, they'll be  
17 able to afford themselves that really important information  
18 without having to then bind themselves to the judgment. That's  
19 the point of that.

20 THE COURT: And that's because what you are suing for  
21 is the disclosures.

22 MR. PENNY: Correct, Your Honor. That was the hub of  
23 the entire case, was to get that sort of a disclosure as well  
24 as the disclosures that surround it to the class members. That  
25 was the injunctive relief we sought in total. The monetary

1 enhanced benefits we sought we discussed this morning. That's  
2 the additional component to the settlement.

3 It's just yet another reason why it's impractical to  
4 have Genworth go through all the work and effort and prejudice  
5 themselves by giving all this relief to the class before the  
6 opt-out decision. It's just not practical. It's one of the  
7 reasons why I harken all the way back to the discussion about  
8 what is actually required of the notice program.

9 Complete, total, exact information, while that can be  
10 the goal of every notice program, is not required, and it's not  
11 required because it is just not practical in most instances to  
12 do that. And Mr. Duvall talked about not only the expense and  
13 time that it will take to generate those letters but how those  
14 letters would only be advisory in any event, because like I  
15 think he was saying, if this settlement is not -- let's say the  
16 settlement were granted final approval today but the appeals  
17 process took a year to play out.

18 Every single input in this special election letter  
19 would change between now and then. Every policyholder would  
20 pay another year's premiums. That will change the calculation  
21 of options one and two, the NFO benefit.

22 THE COURT: What would be said in those letters about  
23 -- while it's on appeal about what the future premiums would  
24 be?

25 MR. PENNY: The future premiums may change between --

1 like what future premiums --

2 THE COURT: No, no, no. What would be said -- you  
3 send me a bill. It's on appeal now. Everybody appeals these  
4 rulings. My time comes up to renew my policy, and you send me  
5 the disclosures that you send me as part of the package you  
6 send me to get me to sign on. What do those disclosures say  
7 that would be different than what the disclosures would say  
8 that Mr. Dailey wants?

9 MR. PENNY: I think what you're asking is if we send  
10 the letters before final approval that include the disclosures,  
11 how would the disclosures change in the letter that is then  
12 sent after the appeals process? Is that what you are asking?

13 THE COURT: Huh-uh. We have an appeal, and what you  
14 said was, and I think it's correct, people are going to get  
15 letters pending the appeal, and none of the disclosures will be  
16 made because the whole issue is up on appeal. So none of the  
17 disclosures required by the settlement agreement will be made.

18 But you are going forward with the business  
19 arrangement with me, inveigling me to take an increased  
20 premium. Then you're going to have to say something about  
21 disclosures in the future, or maybe you're not, but if you do  
22 have to say something about disclosures in the future, how  
23 would the ones you send me on appeal, send me while this case  
24 is on appeal differ in any way from what would be sent in the  
25 final letter assuming I've approved it and the appeal is over?

1           MR. PENNY: When you say the disclosures sent to you  
2 while the final approval is on appeal, you don't mean the  
3 special election letter disclosures, you mean a notice from  
4 Genworth about your next year's bill?

5           THE COURT: Yeah.

6           MR. PENNY: I'm sorry. I wanted to make sure I  
7 understood that. My guess is that Genworth's disclosures in  
8 your annual premium statement won't say much about future rate  
9 increases unless you are currently faced with a future rate  
10 increase. There are many policyholders that will get a rate  
11 increase if this case is on appeal. What they will say then, I  
12 imagine, will be something like what they've said in the past,  
13 and the recent past, which is in your state, and this is not  
14 every state, it's states that have approved this language, in  
15 your state we are planning to request at least 150 percent in  
16 future rate increases, something along those lines.

17           That is much less detailed and much less specific  
18 than the disclosure that that same policyholder would get in  
19 the settlement election letter. In the settlement election  
20 letter, that disclosure about future rate increases would be  
21 specific to that state and that policyholder's policy, and it  
22 would say probably not at least 150 percent, it would say  
23 something like we will plan to seek future rate increases of  
24 203 percent over the next six to ten years.

25           It would be more specific and it wouldn't just be --

1 the 150 percent disclosure is a bit of a low floor, and as we  
2 had alleged in the lawsuit, it is not a full and adequate  
3 disclosure. The disclosure about the future rate increases  
4 will be more specific, more informed, and more direct.

5 THE COURT: Think about this for a minute: A company  
6 has the capability to determine that it's going to be  
7 203 percent increase over the next five years but sends out --  
8 with that knowledge sends out more than 150 percent. Aren't  
9 you right back into exactly the same problem that created this  
10 lawsuit to begin with, and if that's right, and I think it is  
11 right, why would Genworth do that? Do you see?

12 MR. PENNY: I think I see what you're saying, but I  
13 think that's not the way I would envision it happening. So if  
14 Genworth is telling the policyholder that they're planning to  
15 seek 203 percent in rate increases over the next six to eight  
16 years, then the only problem for Genworth would be if they're  
17 actually going to seek more than that, not less than that.

18 And if a regulator doesn't approve the 203 percent  
19 increases that are requested and, instead, the policyholder  
20 only sees 100 percent rate increases, there's no problem  
21 created for the policyholder. There's no additional lawsuit  
22 there.

23 THE COURT: That's not, I don't think, what I'm  
24 trying to get at. Let me think how to posit it to you.  
25 Genworth has the obligation ongoing to make accurate



1 disclosures, and the law is, as this case well settled, once  
2 you start talking about something and make a statement, you  
3 need to say all of what is necessary to make it true.  
4 Otherwise, you've got an omission -- a material omission;  
5 right?

6 MR. PENNY: Yes, Your Honor.

7 THE COURT: Genworth is sending these letters out to  
8 the policyholders while this case is on appeal, and the  
9 significance of that is that none of the disclosures that are  
10 called for by the settlement agreement will be made, but  
11 Genworth knows that the disclosures it will be sending out are  
12 not accurate. They may not know the precise amount for that  
13 policyholder, but they know that they're not accurate.

14 So aren't we back in the same fix that got us into  
15 this case, perhaps not as egregiously on the facts as what the  
16 facts were, what got it in this case to begin with?

17 MR. PENNY: I think Genworth has to decide for itself  
18 what disclosures it will be making about future rate increases,  
19 and those decisions will be informed by this lawsuit and by the  
20 issues raised.

21 THE COURT: I'm sorry. This has to do with -- what's  
22 the name of the doctrine you called?

23 MR. PENNY: The filed-rate doctrine? Oh, the one --  
24 the one-way intervention.

25 THE COURT: One-way intervention. Your point was if

1 you have to prepare a letter now that has in it what you would  
2 prepare after you did all the calculations for that individual  
3 shareholder, that shareholder could opt out, get the benefit of  
4 having had the disclosure but not release the -- not release  
5 Genworth for having -- and part of its consideration was making  
6 a disclosure.

7 But how does that operate where Genworth has got to  
8 make the most accurate disclosure it can or it's going to be  
9 right back in the soup anyway? You have to be a thrill-seeker  
10 to be running Genworth and not disclose what you know about the  
11 rate -- projected rate increases in the future.

12 So I guess that's all by way of saying that  
13 intervention, one-way intervention doctrine is a red herring.  
14 Why do I need to even get to analyzing that? That's  
15 particularly true given that there's a whole lot of other  
16 consideration coming to the shareholder -- to the policyholder  
17 beyond the projected rate increases, i.e., the options one  
18 through five.

19 MR. PENNY: I understand your point, Your Honor. The  
20 point I'm really trying to make, and I dressed it up in the  
21 one-way intervention doctrine parlance, is really that it is  
22 patently unfair for Genworth to have to make these disclosures  
23 that plaintiffs fought for a year and a half to get them to  
24 make to the class members before the class members actually  
25 have to give them a release for it.

1 THE COURT: Why is it unfair?

2 MR. PENNY: Well, because it's not something that  
3 Genworth wants -- I should let Genworth --

4 THE COURT: Let them worry about that argument. I  
5 have to tell you that as the old boy said, I'm not sure that  
6 dog hunts.

7 MR. PENNY: It won't be the first issue that I raised  
8 that didn't really get traction, Your Honor.

9 THE COURT: It's a troublesome thing for me to make a  
10 decision on that theory. I don't think I can do that.

11 MR. PENNY: That was maybe point four or five of what  
12 I think their objection --

13 THE COURT: Put that one back in the kennel.

14 MR. PENNY: Put that one back where it came from.  
15 Let me move off that objection then, Your Honor, and move to  
16 another one of theirs. They made an issue on Friday and in  
17 their brief about the fact that the Pennsylvania unfair trade  
18 practices and consumer protection law claim in some instances  
19 comes with treble damages, and that on that basis alone, the  
20 Pennsylvania class members should have been entitled to greater  
21 relief in the settlement.

22 And the point I want to make there, Your Honor, is  
23 that treble damages are discretionary. They are not  
24 obligatory. And the Agulnicks' counsel haven't made any  
25 attempt to demonstrate that on the facts of this case, an award

1 of treble damages would even have been likely if plaintiffs  
2 crossed all other hurdles to get that Pennsylvania class  
3 certified and proved their claim in court.

4 So the fact that -- we point the Court to the  
5 *Rodriguez* case --

6 THE COURT: Help me just one minute. Are we  
7 certifying a class under the Pennsylvania act?

8 MR. PENNY: No, we're not, Your Honor.

9 THE COURT: What does that have to do with anything?  
10 If I'm not certifying a Pennsylvania settlement class, and  
11 that's -- the case is going out the door, what's this have to  
12 do with anything?

13 MR. PENNY: That's a very good point. It was  
14 actually my second point which is that claim is not actually  
15 being certified or settled in this lawsuit.

16 THE COURT: But the point is, I guess, they're  
17 releasing it. The policyholders are releasing it; is that Mr.  
18 Agulnick's point?

19 MR. PENNY: You'd have to ask his counsel, but I  
20 suppose that would be his point, is that there is a release.  
21 The release doesn't apply specifically to his claim, but I'm  
22 sure you can read it to encompass --

23 THE COURT: So a general release.

24 MR. PENNY: Yeah. But the point is, and --

25 THE COURT: The Agulnicks, they're in Pennsylvania,

1 are they?

2 MR. PENNY: Yes, Your Honor, they are.

3 MR. DAILEY: Yes, Your Honor.

4 MR. PENNY: We had pointed out in our brief, we had  
5 cited the *Rodriguez* case at page 37 of the reply, 37 of 47 of  
6 the reply which points out that the prospect for such treble  
7 damages is merely speculative and, quote, courts do not  
8 traditionally factor treble damages into the calculus for  
9 determining a reasonable settlement value.

10 THE COURT: Are there tentative damages in the Fair  
11 Credit Reporting Act?

12 MR. PENNY: There are different levels of statutory  
13 damages in the FCRA for willful violations versus just  
14 violations.

15 THE COURT: How about the Fair Debt Collection  
16 Practices Act?

17 MR. PENNY: I think that is also true --

18 THE COURT: Both are willful; right?

19 MR. PENNY: I think both -- yes, I think they have  
20 levels different for willful violation. The same kind of  
21 concept is at play with the treble damages clause in the  
22 consumer protection law. You have to establish some egregious  
23 conduct in order to get not just your actual damages but treble  
24 damages.

25 THE COURT: Under the Supreme Court's decisions, you

1 have to have a level of scienter in order to get treble  
2 damages.

3 MR. PENNY: And this is our point, Your Honor, which  
4 is why it's so speculative. Just like the *Rodriguez* case says,  
5 that you don't really factor that into a settlement value when  
6 you're analyzing whether the settlement is fair, reasonable,  
7 and adequate.

8 And also to the extent that the Pennsylvania statute  
9 entitles the prevailing litigant to attorneys' fees and costs,  
10 Genworth is actually bearing the attorneys' fees and costs in  
11 this settlement, and so to that extent they have already been  
12 given value for that aspect of the claim. I think that was all  
13 the issues the Agulnicks raised.

14 THE COURT: I think so.

15 MR. PENNY: I'll cede the mic.

16 THE COURT: Do you have more?

17 MR. DUVALL: Well, I do, Your Honor. Not much more,  
18 but Your Honor had asked some questions and asked us to confer  
19 with our clients, and I wanted to provide --

20 THE COURT: I didn't know you had done that.

21 MR. DUVALL: My intrepid colleagues did that on a  
22 break. Very quickly, I know I've spoken a lot. I just want to  
23 give Your Honor this information. If final approval were  
24 granted today, Genworth could start sending special election  
25 letters out to class members in states that have permitted

1 those to go out by October of this year. This is assuming no  
2 appeal and so on, but October, so from today to October.

3 As for the regulatory feedback timeline, I'm told  
4 that the discussions, Your Honor's questions, these types of  
5 issues can take anywhere from three months to several years,  
6 and that is the best we can do, but more to, I hope, Your  
7 Honor's concern, Genworth has advised regulators, and I should  
8 have mentioned this to you earlier, that they would like  
9 comments to the special election letter and that if they don't  
10 have any comments or prohibitions on it, then by August, then  
11 they plan to start sending those out. So, again, we've set  
12 this up to move as quickly as we can after final approval.

13 And then just a real last point of emphasis on this,  
14 Your Honor, if, by contrast, we hold up the final approval  
15 process until that regulator engagement process and my hamster  
16 wheel point --

17 THE COURT: What's that?

18 MR. DUVALL: Just setting up my hamster wheel point I  
19 made earlier, if, for example, a state required, said we need  
20 to put an additional chart in that letter, and then we had to  
21 come back to this Court before final approval was granted and  
22 say, well, should we offer that chart to all 50 states, well,  
23 that would just not only take longer than the process I am  
24 describing, but it would invite additional questions like,  
25 well, does the class notice have to be redone, is there now an

1 opt-out issue.

2           What we've set are the terms of this settlement, and  
3 we are prepared to implement them on the fastest possible  
4 timeline to get the class consistent and equal relief. Thank  
5 you.

6           THE COURT: Mr. Dailey.

7           MR. DAILEY: Thank you, Your Honor. Fortunately, I  
8 know it's late in the day, and having asthma and having this  
9 mask on all day, I'm a little short on air, so I'm going to be  
10 brief which I'm sure is music to Your Honor's ears.

11           THE COURT: Do you want to take a recess and get some  
12 fresh air?

13           MR. DAILEY: I appreciate that, but I think I'll be  
14 okay.

15           THE COURT: The other thing is if you had told me,  
16 I'd have put you over in the corner and not had you have the  
17 mask on.

18           MR. DAILEY: I appreciate that, too, Your Honor. I  
19 should have spoken up, but I'll be all right.

20           You know, we heard about how elegant this settlement  
21 was, and I do want to commend Mr. Penny and Mr. Duvall and both  
22 sides. Clearly a lot of work has gone into this, but the fact  
23 that they are well intentioned and a lot of work has gone into  
24 this does not mean that we're where we need to be.

25           And one of the deficiencies which has been



1 highlighted throughout today is the lack of evidence, and I'm  
2 not going to belabor that point because I think Your Honor has  
3 already addressed it by talking about additional submissions  
4 that you would like to have.

5 So I'm going to focus on a couple of the issues that  
6 they raised today, one of which I believe is somewhat of a  
7 straw man that our requests may have been misconstrued, and  
8 that's the request for additional information to be provided to  
9 the class.

10 What you've heard from --

11 THE COURT: Before opt-out.

12 MR. DAILEY: Before opt-out to all the class members,  
13 this concept that we've been asking for 207,000 individual  
14 notices to be sent out. And we are asking for additional  
15 information to be provided, and, to be clear, that additional  
16 information is information that I think everyone has conceded  
17 here today is known to both Genworth and to plaintiffs'  
18 counsel.

19 THE COURT: Just so we don't have any  
20 misunderstanding, what information do you want?

21 MR. DAILEY: Yes. It's the amount of the rate  
22 increases, the number of years --

23 THE COURT: The amount of what rate increases?

24 MR. DAILEY: The premium rate increases. It is the  
25 information I addressed the last -- you asked me to point out

1 very specific information in the last hearing. It was the rate  
2 increases, the number of years --

3 THE COURT: Yeah, but what rate increases are you  
4 talking about; the ones they are projecting or the ones -- what  
5 do you mean?

6 MR. DAILEY: Yes. There are known rate increases  
7 that they are going to request or that they currently  
8 anticipate requesting.

9 THE COURT: Just so I understand, it is the amount of  
10 the rate increase that they would calculate when they put all  
11 their systems together and put in this letter that goes out to  
12 the -- called the special election letter that says we expect  
13 to request in your state increases, to use Mr. Penny's example,  
14 of 203 percent over the next five years; is that the one you  
15 are talking about?

16 MR. DAILEY: Yes, Your Honor. I'm not suggesting  
17 that they need to provide that information in 207,000  
18 individual letters.

19 THE COURT: I guess his -- you don't know that. You  
20 don't know in each state what the rate increase would be.

21 MR. DAILEY: They would have to do it in some number  
22 of -- some number of analyses would have to capture that  
23 information to disclose it.

24 THE COURT: Well, you start with 50 states --

25 MR. DAILEY: Yes.

1           THE COURT: Then in order for -- your argument is in  
2 order for you to intelligently choose whether to take one of  
3 the five options, you would have to know what your rate  
4 increase is; right?

5           MR. DAILEY: Yes.

6           THE COURT: That's 207,000 notices if there's 207,000  
7 policyholders.

8           MR. DAILEY: Well, I believe they could accomplish  
9 that by using information that they already have internally,  
10 and that is by the type of policy and the state. Maybe I am  
11 misunderstanding the process, but I believe with those two  
12 pieces of information, they could prepare summaries that would  
13 be applicable to different groups within the class.

14          THE COURT: How would they do that? How would they  
15 do what you're talking about? How would they pick out what  
16 group gets what letter?

17          MR. DAILEY: The same way that they're going to  
18 approach and with the same information that they're going to  
19 approach the state regulators and present that same information  
20 to them. They're not going to do it in 207,000 different ways.  
21 They're going to do it by policy and by state. So I wanted to  
22 clarify that point, because I think there may have been  
23 something that may have been misconstrued from our papers.

24          THE COURT: How many policies are there?

25          MR. DAILEY: You know, they attached a chart to the

1 settlement agreement as one of the appendices. I believe it  
2 outlined the different policies that the settlement applied to.  
3 I could count them right now, Your Honor --

4 THE COURT: How many are there, Mr. Duvall? Do you  
5 know? She knows.

6 MS. TURNER: Appendix A to the settlement agreement.

7 THE COURT: How many different policies are there?

8 MR. DUVALL: These are all choice one policies. Just  
9 because they have different numbers per state doesn't make them  
10 non-choice one policies. This is just a way to identify by  
11 state form number the choice one policy.

12 THE COURT: So we're talking about 50 policies?

13 MR. DUVALL: We're talking about choice one policies,  
14 the type of policy, one type of policy.

15 THE COURT: That's one policy that applies in all 50  
16 states.

17 MR. DUVALL: Right. And in one state, it may it have  
18 a different form number than in another state.

19 MR. DAILEY: So to the extent that they're going to  
20 be -- they may be asking for the same rate increases across all  
21 50 states in which then I think the analysis and the disclosure  
22 to the class becomes even easier based on what I've just heard.

23 If they're asking for different rates to be applied  
24 in different states, then we think they should provide those  
25 different analyses. So I wanted to clarify that. The --

1           THE COURT: Before you go anywhere, Mr. Duvall, you  
2 all have talked about how difficult all this is, but if you've  
3 got one policy and you're going to seek the same rate increase  
4 in every state, why isn't it sufficient that you could tell a  
5 policyholder we're going to seek X increases and it would  
6 really just be one notice?

7           MR. DUVALL: Two reasons, Your Honor. While it's the  
8 choice one policy with different forms per state, it's also  
9 different rates per states and different rate requests per  
10 state and different rate increases that may or may not be  
11 granted per state. So that does vary per state, so we can't do  
12 a single nationwide notice on that question.

13          THE COURT: But it's only 50.

14          MR. DUVALL: It's 50 different states with 50  
15 different rate increase requests and grants and considerations,  
16 and some of them --

17          THE COURT: You are just talking about the one you're  
18 going to ask for, and that's -- in 50 states, you have one rate  
19 increase per state, or you have -- and that's all you are  
20 dealing with. What's the big deal about doing that?

21          MR. DUVALL: Just to be clear, and I was about to try  
22 to make this point. In some states, it maybe multiple types of  
23 rate increases depending on benefit level of the policy. For  
24 example, a different rate increase may be sought and ultimately  
25 applied to an unlimited benefit policy versus a limited benefit

1 policy. But the second point --

2 THE COURT: How many unlimited benefit policies are  
3 there? Is that the 47,000 --

4 MR. DUVALL: I think that's roughly -- I think we  
5 referenced a number on Friday of 49,000 which was unlimited  
6 benefit plus the inflation protection, the interest rider. So  
7 there are different rate increase histories and pendencies and  
8 potential approvals including by levels of benefit per state.

9 To the second question, this kind of gets back to  
10 what --

11 THE COURT: You know, that's a very effective way of  
12 creating the appearance of a lot of work, but how many  
13 different letters would you have to send? You left the  
14 impression you'd have to send 207,000 in your papers. He says,  
15 no, you probably could send 50. That's a big difference  
16 between the two, and neither one of you have given me any real  
17 hard evidence about how much it would take.

18 Now is the time. Tell me exactly how many different  
19 letters you'd have to create. Your client has said they have  
20 to do X, Y, and Z and go through different permutations and  
21 combinations. I want to know exactly how much.

22 MR. DUVALL: As I stand here right now, I can't say I  
23 question, but the fundamental point is, what basically is being  
24 asked for is for us to give the first capital D disclosure  
25 which is one of the centerpieces of the settlement, and in the

1 lawsuit, it was a contested issue.

2 THE COURT: Look, then let's get the issue on the  
3 table that way. The issue is not how much trouble it is. The  
4 issue is that you are being forced to part with the  
5 consideration, and you don't get the benefit. That's the issue  
6 on this; right?

7 MR. DUVALL: That's a big issue.

8 THE COURT: What's the other issue?

9 MR. DUVALL: The issues I've already articulated  
10 about the difficulty and time it takes to do that, the time it  
11 will take to get the class their relief, that delay.

12 THE COURT: No, no.

13 MR. DUVALL: I agree with you that a big issue is  
14 we'd essentially be asked to get part of the settlement out  
15 now. Big issue.

16 THE COURT: All right. And then somebody has to  
17 answer to how many -- how much work you're really talking about  
18 doing. Has somebody got that done?

19 MR. DUVALL: I'm sorry, Your Honor.

20 THE COURT: How much work is it? You have created --  
21 you know, sort of like Lady Macbeth over the cauldron boiling  
22 and bubbling and so forth, and out come all these beasties and  
23 scary things, and, right now, I don't have enough information  
24 to know how much of a job it really is.

25 MR. DUVALL: I'm happy to supplement the record with

1 those facts, Your Honor.

2 THE COURT: You don't know, all right.

3 MR. DUVALL: Thank you.

4 THE COURT: So why should anybody in the class get  
5 part of the consideration in the lawsuit remembering that the  
6 gravamen of the claim in a lawsuit that is being settled is a  
7 prayer for disclosures. Why should you get part of it without  
8 you giving up anything, i.e., opting out or staying?

9 MR. DAILEY: Well, what they're really asking for,  
10 Your Honor, is that they should be allowed to continue to not  
11 tell the class the truth, that they should be allowed to  
12 continue to withhold this information.

13 THE COURT: You turned that around in a way that was  
14 nice for you, but that isn't what I asked you. I asked you why  
15 should you be allowed to get part of the consideration of the  
16 settlement and not give up something. That's the way  
17 settlements work.

18 MR. DAILEY: Well, we haven't opted out, so we are  
19 part of the settlement if and when it gets approved.

20 THE COURT: No, but you've objected.

21 MR. DAILEY: We have objected until --

22 THE COURT: If I sustain your objection, then they  
23 have to provide information, and then you have the right to opt  
24 out. That's the result. If I overrule your objection, you  
25 have the right to take that to the Fourth Circuit and see if



1       they'll say you are right and I'm wrong.

2               MR. DAILEY: But the information that we're asking  
3       for goes directly to one piece which is what is the value --  
4       how much are they going to increase my policies. If I'm giving  
5       them a full release, then I want to know how much more they're  
6       going to charge me in the future and how much that's going to  
7       cost me. That's not all of the disclosures and all of the  
8       disclosure relief. That goes to one particular piece about  
9       what I'm getting --

10              THE COURT: What else are they going to disclose  
11       under your theory? They're going to disclose -- as I  
12       understand it, we're going back to those options. They're  
13       going to disclose what the cash payment is, because that's part  
14       of the value of the settlement. They're going to disclose  
15       which one -- and you know which options you can choose. What  
16       do they have to disclose? I need to know what you're talking  
17       about.

18              MR. DAILEY: That's all I'm asking for them to  
19       disclose.

20              THE COURT: What?

21              MR. DAILEY: The rate increases --

22              THE COURT: Projected rate increases in the future in  
23       that state for you.

24              MR. DAILEY: Yes, Your Honor.

25              THE COURT: Projected rate increases. Then what

1 else?

2 MR. DAILEY: The number of years that they plan to  
3 request those rate increases.

4 THE COURT: That's it?

5 MR. DAILEY: Then the information that Mr. Penny went  
6 through earlier today --

7 THE COURT: What? Tell me exactly what you want.

8 MR. DAILEY: So he talked about one side of the  
9 equation which was information about the payouts and how they  
10 value the different options, what class members will get. We  
11 would like --

12 THE COURT: Will you please, Mr. Dailey, tell me what  
13 you want, not what he said. I just want to know what you want.

14 MR. DAILEY: We would like -- before today, that's  
15 what we were asking. Some of the information he gave today was  
16 not all the information we're asking for --

17 THE COURT: You're still not doing it. You are  
18 talking about what he did. I want to know, please, sir, what  
19 is it that you want disclosed?

20 MR. DAILEY: The value of the cash payouts.

21 THE COURT: That would just be the amount; right?

22 MR. DAILEY: Correct. And he went through some of  
23 those today which we had never heard before today.

24 THE COURT: So the cash payout amounts.

25 MR. DAILEY: And then the value of the benefits that

1 the class members are being asked to give up when they reduce  
2 their benefits; for example, going from the unlimited payout to  
3 a six-year or one of the other reduced benefit options.

4 THE COURT: How do they do that?

5 MR. DAILEY: How do they do what, Your Honor? I'm  
6 sorry.

7 THE COURT: How do they tell you what is the value of  
8 the benefit that you're being asked to give up? What do they  
9 do to do that?

10 MR. DAILEY: Provide the internal calculations that  
11 they've done on that very issue to determine if this was  
12 feasible to them to agree to as a settlement. My clients don't  
13 have --

14 THE COURT: You are assuming they did that; right?  
15 Do you know they did it? Has class counsel done discovery on  
16 it and have you asked class counsel on that?

17 MR. DAILEY: I don't know if they have done that.

18 THE COURT: How do I even know this exists?

19 MR. DAILEY: One, I believe it's going to be  
20 requested by the regulators. California has already indicated  
21 that's the information that they would like. So consistent  
22 with what we said in our objections, unbeknownst to us,  
23 California, the California Department of Insurance filed  
24 theirs. It was much more detailed, but they said the same  
25 exact same thing in more detail about they're going to request

1 information about the value that class members are giving up in  
2 exchange for what they're getting. So that's information that  
3 we're also requesting. If Your Honor --

4 THE COURT: Is that it?

5 MR. DAILEY: That's all on that point, yes, Your  
6 Honor.

7 THE COURT: Is that all you are asking for that they  
8 disclose to you?

9 MR. DAILEY: Yes, Your Honor.

10 THE COURT: Okay, I've got it then.

11 MR. DAILEY: The next point I'd like to address is  
12 the Pennsylvania subclass.

13 THE COURT: Okay.

14 MR. DAILEY: I'll amend my prior statement that  
15 that's all that I'm asking for because there is a piece related  
16 to this point on the Pennsylvania subclass that I'm also asking  
17 for. So they've said that we're not entitled to it because --

18 THE COURT: Not entitled to what?

19 MR. DAILEY: Not entitled to any additional recovery  
20 for Pennsylvania subclass because of the treble damages, and  
21 they focused on the treble damages element of the claim.

22 But they, class plaintiffs' counsel, pled that claim.  
23 Nothing has changed since they pled that claim. It survived up  
24 until this point, up until the settlement, and now it's been  
25 abandoned without any explanation other than it's hard to prove

1 at trial.

2 Well, we knew that the day that they filed the  
3 complaint. There hasn't been some intervening change in the  
4 law. They have not provided any facts that I'm aware of  
5 that -- none have been in the papers to say that this claim  
6 won't survive. They've just talked in generalities about how  
7 those types of cases are difficult.

8 What they don't address is that there are statutory  
9 damages. So unlike other parts of the argument of plaintiffs  
10 where they said if you keep your policy, you're not damaged, so  
11 if you decide to keep your policy and pay the premiums, you're  
12 not entitled to any benefit under the settlement.

13 I disagree with that. I disagree with that as a  
14 whole for some of the reasons raised by the other objectors,  
15 but I'm not going to retread that water. It's not necessary.  
16 But I disagree with it with respect to the Pennsylvania  
17 subclass because there are statutory damages tied to the  
18 misrepresentations regardless of whether they would have done  
19 something different or not.

20 So in addition to the measure of damages that Your  
21 Honor discussed with both sets of counsel, there are statutory  
22 damages that are separate and distinct --

23 THE COURT: What are the statutory damages?

24 MR. DAILEY: I forget the amount, Your Honor, but I  
25 can get the amount for you. If you would like, I can send the

1 case or the statutory cite.

2 THE COURT: Does anybody know what the amount of the  
3 statutory damages are in Pennsylvania under the Pennsylvania --

4 MR. PENNY: I don't think there are any, Your Honor.

5 THE COURT: That's fairly key to what's going on here  
6 right now. What's the statute? Anybody have the statute here?

7 MR. DAILEY: The reason I don't have that is this is  
8 the first -- I don't -- they raised the treble damages, but the  
9 issue on the statutory damages came up today.

10 THE COURT: What?

11 MR. DAILEY: I wasn't anticipating that the issue of  
12 the statutory damages would come up today, so I don't have that  
13 handy. I can get that and submit that --

14 THE COURT: That's part of your objection. I would  
15 think you'd know about it.

16 MR. DAILEY: If Your Honor can give me a moment, I  
17 can find it quickly.

18 MR. PENNY: It's probably against my interest to try  
19 to help out Mr. Dailey, but I think there is a provision. It's  
20 actual damages or \$100, whichever is greater.

21 THE COURT: \$100 for what?

22 MR. PENNY: Per violation --

23 THE COURT: Per practice.

24 MR. PENNY: And, in this instance, the relief far  
25 exceeds that statutory damages floor. So you're looking at

1 actual damages.

2 MR. DAILEY: I don't believe that members who decide  
3 to keep their policy would recover anything under what they  
4 represented to the Court. So if someone decides to keep their  
5 benefits and continue to pay the premiums, my understanding  
6 from the presentations earlier was those class members would  
7 not recover anything but would still be giving a release, and  
8 if you're a member of the Pennsylvania class, there's no need  
9 to give up your Pennsylvania statutory damages. You are able  
10 to do both. You are able to keep your policy, and you're not  
11 subject to the argument that they raised earlier because of the  
12 statutory damage element.

13 Your Honor, I don't have any additional points to  
14 raise in response to theirs outside of what's already been  
15 raised in the papers, but --

16 THE COURT: The papers are about as confusing and  
17 baffling as anything I've ever seen. "The settlement agreement  
18 as proposed creates conflicts between class members and treats  
19 class members' compensation differently without sufficient  
20 explanation."

21 I read that, and I cannot for the life of me figure  
22 out what on earth is being said there. That's your objection,  
23 page eight of ECF 162.

24 MR. DAILEY: What I'm getting at, Your Honor, is the  
25 fact that under the proposed settlement, they talk about it in

1 terms of five options. In our objection, I laid out what are  
2 actually 13 different options that are set out in the  
3 settlement appendices and the various settlement options in the  
4 treatment. One of those is if the state regulators --

5 THE COURT: You don't explain what this is. I cannot  
6 understand what you are objecting to here. What is the  
7 objection?

8 MR. DAILEY: Yes, Your Honor. I will back up. In  
9 appendix C to the settlement agreement, they set out --  
10 plaintiffs' counsel and Genworth's counsel discuss it as five  
11 options, and in appendix D to the settlement agreement, it's  
12 described as five options.

13 But when you go through the categories that are in  
14 appendix D, that special elections letter, there are actually  
15 13 different options. One of those is that if the regulators  
16 don't allow them to do what they're requesting, you get \$100.  
17 And we heard from Mr. Penny that some members may get \$28,000  
18 worth of benefit if they double their benefit package. He  
19 described that scenario, someone who got -- they had 28,000 in  
20 paid-up benefits, they chose an option --

21 THE COURT: What are you objecting to?

22 MR. DAILEY: The difference in the compensation for  
23 these different options without explanation for the variance.

24 THE COURT: What are you talking about? Variance,  
25 what are you talking about?



1 MR. DAILEY: The different settlement options have  
2 different value without explanation, so there are different  
3 class members --

4 THE COURT: That's different than -- you are saying  
5 different value without explanation. You were talking about  
6 variations a minute ago, and I don't understand.

7 MR. DAILEY: What I was referring to inartfully, Your  
8 Honor, is variations in the value.

9 THE COURT: What does that have to do with whether  
10 there are five or 13 options?

11 MR. DAILEY: It doesn't have to do with whether  
12 there's five or 13 options because the same problem exists  
13 whether you look at it as five options or 13 options.

14 THE COURT: Why am I being asked to focus on the fact  
15 there's a difference in one place that says five options and  
16 one place 13?

17 MR. DAILEY: My objection is not the fact they  
18 describe it as five options and that it's 13 options.

19 THE COURT: I am denying this objection out of hand  
20 because I can't understand it, it's inarticulate, and I've  
21 given you a chance to explain it. That hasn't helped any at  
22 all. Looks to me like you put together a whole lot of stuff  
23 without thinking it through too much.

24 You have objection three, "The settlement contains a  
25 conflicting opt-out release in favor of defendants with an

1 opt-in election procedure to obtain benefits to the detriment  
2 of the class members." Now, I don't understand -- I have read  
3 that, and I do not understand what provisions you are talking  
4 about. I realize -- I see what you say, but I don't understand  
5 it when I read the settlement agreement. So can you help me  
6 with what you mean in objection three?

7 Upon reflection, maybe you'd like to drop that  
8 objection because it doesn't seem to me to fly anyway, but  
9 maybe if you can explain it to me.

10 MR. DAILEY: What I'm getting at, Your Honor, and I  
11 have not asserted that in my presentation, but I was getting  
12 at --

13 THE COURT: Well, then, we'll drop it. It's  
14 withdrawn. Okay? Do you agree?

15 MR. DAILEY: Yes, Your Honor.

16 THE COURT: All right, now, let's go back to  
17 objection two. "Counsel has not established that there is a  
18 meaningful benefit when compared to the alleged damages and  
19 risks of losing." That is, I gather, your objection that the  
20 value is not explained, the \$100 million.

21 MR. DAILEY: Yes, Your Honor.

22 THE COURT: He explained it this morning, how he got  
23 there, and I think the other day when you were raising your  
24 objection you said there wasn't any evidence to support it, and  
25 I think you were right, there wasn't any evidence to support

1 it, but he's explained how he arrived at that figure on the  
2 basis of the evidence that does exist in the record and how he  
3 applied the various factors that he applied to get to a figure  
4 which I think he said was actually on the conservative side.  
5 Does that satisfy your objection to number two?

6 MR. DAILEY: No, Your Honor.

7 THE COURT: What should be done here?

8 MR. DAILEY: First, that information is not in the  
9 record. It may have been produced in the case --

10 THE COURT: It's in the record here.

11 MR. DAILEY: We have counsel's representations in the  
12 record about other data that was not presented in court today  
13 for Your Honor to evaluate or for me to evaluate, and while I  
14 have no reason to believe that Mr. Penny is misrepresenting  
15 information, I think the Court should have an opportunity to  
16 evaluate that data as well as others. I may see something in  
17 it that he didn't see.

18 And so I don't agree that that is sufficient for him  
19 to have established that, and I don't believe that him saying  
20 it makes it evidence that this Court can consider.

21 Once it's been presented and authenticated and  
22 admitted in the court, then the Court can consider it. Until  
23 then, it's just representations of counsel. It's just  
24 argument, and it has no weight that the Court can give to it.

25 THE COURT: All right. That's your objection on

1 number two.

2 MR. DAILEY: Yes, Your Honor.

3 THE COURT: Now, in Roman numeral I of your -- let me  
4 find it. You say, you recite in the first objection a number  
5 of things that are said in the notice; right? And then you  
6 say, "Absent from all of these options is any consideration for  
7 any class member that chooses not to do business with  
8 defendants and wants to walk away completely from their current  
9 policies. Yet, the proposed settlement would have them release  
10 their claims."

11 Now, is that still an objection after what he said?

12 MR. DAILEY: I believe, based on their  
13 representations, their view is that that's not true, and I  
14 accept that.

15 THE COURT: So that's withdrawn, and I don't need to  
16 deal with it.

17 MR. DAILEY: Yes, that portion.

18 THE COURT: Yes, that's what I'm talking about. Then  
19 it says, "Furthermore, class members who do wish to maintain  
20 policies with Genworth are asked, without the benefit of  
21 knowing all the terms, to sort through and figure out which of  
22 the foregoing categories they fall into and then figure out  
23 what the benefit is to them as compared to their current  
24 situation."

25 That argument in that paragraph is what you initiated

1 your discussion about, and that is the not providing the  
2 additional information to the class about opting out such as --  
3 and you told me that was the amount of the rate increases  
4 projected and the number of years, the cash payout amount, and  
5 the value of benefits being asked to give up.

6 MR. DAILEY: Yes, Your Honor.

7 THE COURT: So now I've got that. Thank you.  
8 Anything else?

9 MR. DAILEY: I have nothing further, Your Honor.

10 THE COURT: All right, thank you. If it's bothering  
11 because of the mask situation, get over there in that back  
12 corner and sit down, and you can take your mask off. You're  
13 not going to expose anybody over there.

14 MR. DAILEY: Thank you, Your Honor.

15 THE COURT: I'm sorry. You've taught me something.  
16 We'll have to tell people --

17 MR. DAILEY: That's okay. If I thought it was going  
18 to create a real health risk to me, I would have spoken up.  
19 Just made me a little hoarse, and, like I said, probably --

20 THE COURT: Do you want some water?

21 MR. DAILEY: I suspect, Your Honor, and I don't  
22 control your schedule, I suspect we're nearing the end, and I  
23 think I can tough it out until we're finished.

24 THE COURT: We may or may not be nearing the end. Do  
25 you have a plane?

1 MR. DAILEY: I drove from Philadelphia, Your Honor,  
2 so I'm fine.

3 THE COURT: I guess people aren't flying today.  
4 Okay, thank you. Well, he's raised a couple of points, the  
5 Pennsylvania subclass, and essentially I think what he's saying  
6 is you haven't explained why you didn't extract more tribute  
7 because of the value of that case, i.e., you should have said  
8 we have a hard time -- here's why we have a hard time proving  
9 the Pennsylvania subclass liability, and --

10 MR. PENNY: Your Honor, as you will recall from the  
11 motion to dismiss proceedings, etcetera, the Pennsylvania UTCPL  
12 -- UTCPL claim was largely a tagalong claim to the primary  
13 fraud claim. They overlapped in many respects.

14 THE COURT: Is the basic proposition that you are now  
15 being called upon to deal with the dog that you brought to the  
16 field trials that doesn't hunt that you should have left alone,  
17 add a little lard in it, as Judge Williams said, but now having  
18 said it, you have to say why it is that you are not -- you  
19 didn't pursue it and get any good out of it is his argument; is  
20 that right, Mr. Dailey?

21 MR. DAILEY: Yes, Your Honor.

22 MR. PENNY: And what I'm trying to explain in my  
23 briefing to Mr. Dailey and to the Court is that this is a  
24 settlement. There are many claims that are brought in  
25 lawsuits, and you settle the claims on behalf of the entire

1 class as best you can. That claim was not worth anything more  
2 at the settlement table than any of the claims that were  
3 settled.

4 A \$100 minimum statutory damages claim, even if you  
5 were successful at trial, does not get you over the hump. The  
6 major problem with the Pennsylvania claim is that -- and I hate  
7 to have to say this as a plaintiff's attorney in open court, it  
8 is very, very challenging to certify a Pennsylvania consumer  
9 fraud claim in a lawsuit.

10 It is much easier to certify a run-of-the-mill fraud  
11 claim based on common law. That claim is not worth any more in  
12 this settlement than the fraud claims that were alleged that  
13 might actually have been worth less, but, again, this is all  
14 part of the calculus --

15 THE COURT: Where in your paper, I think is the  
16 issue, does all this appear?

17 MR. PENNY: In the reply brief you mean?

18 THE COURT: No. In your notice, in your motion to  
19 approve, where does it say, look, we're giving up and these  
20 people are giving up whatever rights they have under the  
21 Pennsylvania law because, in our view, there would be no  
22 greater relief obtained under the Pennsylvania law than under  
23 the settlement of count one which is the fraud claim?

24 MR. PENNY: It doesn't specifically say that in the  
25 notice.

1 THE COURT: It needs to, according to him.

2 MR. PENNY: I don't think he's right. I don't think  
3 he cited any case or even made a cogent legal argument that  
4 would suggest that a class notice has to be so detailed that it  
5 informs the class members of all the negotiation process that  
6 went into creating the benefits.

7 The class members need to know what the claims  
8 alleged in the lawsuit were. That's what we said in the  
9 notice. They need to know what was settled, and they can  
10 assess for themselves whether they want to be part of that  
11 settlement and be bound by the release or exclude themselves.

12 They have all that information in front of them.  
13 They don't need to specifically be told that those Pennsylvania  
14 residents that could have pursued the Pennsylvania consumer  
15 protection claim might have been, on their very best day,  
16 entitled to \$100 in statutory damages, might have been, at the  
17 discretion of the judge, awarded three times that amount if  
18 they could have gotten through a very difficult class  
19 certification process, etcetera, and that class counsel took  
20 all this into consideration. They don't need to have all those  
21 details.

22 THE COURT: You're from Pennsylvania. Why wouldn't  
23 you want those details, because you have a class -- I mean an  
24 opportunity to recover that is independent and apart from the  
25 count one.



1           MR. PENNY: It's not really independent and apart.  
2     The consumer fraud claim and the common law fraud claim were  
3     rising or falling on basically the same set of facts. If you  
4     will remember, at the motion to dismiss hearing, we spent all  
5     the time talking about the common law fraud claim, and the  
6     Pennsylvania law claim got sustained basically on the basis of  
7     the discussion about the fraud claim.

8           It's not a separate claim. It's not a more valuable  
9     claim. It's not a claim that was entitled to any specific  
10    deference or reward at the settlement table or in the approval  
11    process.

12           THE COURT: That's why you didn't put it in the  
13    settlement, in the notices and in the proposed -- yeah, the  
14    notices. Would it hurt to add into the notice that we're also  
15    settling the claim for such-and-such which is essentially the  
16    same as the ones being settled and it doesn't add anything to  
17    the case, and, in the opinion of counsel, the settlement fairly  
18    encompasses what you'd be entitled to get for that?

19           MR. PENNY: I mean, I suppose you could have --

20           THE COURT: Or words more eloquent than that. You do  
21    a lot of elegant stuff, so --

22           MR. PENNY: I'm sure you could have any sort of  
23    additional disclosures and information in the --

24           THE COURT: Draft one up.

25           MR. PENNY: Draft one up for what?

1 THE COURT: Draft up a little bit of add-on for the  
2 notice. You haven't set the notice out yet, have you?

3 MR. PENNY: Sure we have.

4 THE COURT: I'm sorry, final notice. Okay, yeah,  
5 you're right, I'm sorry. It's too late in the day.

6 MR. PENNY: It is getting late.

7 THE COURT: Suppose I conclude that you should have  
8 done that but you didn't. What do I do?

9 MR. PENNY: In order --

10 THE COURT: Require a subsequent notice to go out?

11 MR. PENNY: In order to make that conclusion, you'd  
12 first have to find some legal basis that says that notice has  
13 to be that complex, and then if you did, I suppose the remedy  
14 would be to send a supplemental notice to all the class members  
15 within an additional period to opt out.

16 THE COURT: Well, it isn't really all that complex to  
17 say that, but I think the fact is that it's the same claim, and  
18 the idea that -- same claim that's being settled, and you're  
19 getting good value for what you are settling is the -- or are  
20 you is the real issue, and it looks to me like that there's a  
21 lot of value to class members here. I have a lot of other  
22 problems with this matter but not necessarily that one. Does  
23 that take care of all of what we've got?

24 MR. PENNY: I think so unless you'd like to hear any  
25 more about the Agulnicks.

1           THE COURT: As evidenced by my last question, it's  
2 probably time to close the door right now. I think I've got --  
3 I think I've got questions, and I need some answers. I would  
4 like to sort through my notes and put to you the questions in a  
5 deliberate way so I'm not just grabbing from my notes right now  
6 and my memory. So I'm going to do that, but I will require  
7 some further information before I can make a final decision on  
8 this.

9           I will tell you, just so you know, I do want to  
10 understand the timeline and the alleged complexities of doing  
11 what Mr. Dailey wants done. That's not to say it's  
12 appropriate, but it is to say I need to understand what is  
13 being -- what really it is beyond the plaintive cries of  
14 distress and trouble, and I'm sure it's work, and I'm sure it  
15 is trouble.

16           So you might start getting on that, and tomorrow or  
17 the next day, you'll -- I'll be in touch with you. I probably  
18 will do it by telephone conference so you can ask questions,  
19 and then I'll follow it up with an order, and we'll move out on  
20 it.

21           I think this case had a lot of complexity to it, and  
22 I think the settlement shows a lot of thought and balances some  
23 very difficult considerations based upon the nature of the  
24 claim that is asserted in count one, and we must always remain  
25 mindful that the settlement has to be evaluated in the final

1 analysis against the evidence and the likelihood of prevailing  
2 on the count that is asserted in the complaint, not on things  
3 that might have been brought.

4 So I have to sort that out, and I'm going to think it  
5 through, and I'll be in touch with you. Thank you very much.

6 THE CLERK: Judge, if I may interrupt, Janice Wynn  
7 has raised her hand. I don't know if she'd like to say  
8 something.

9 THE COURT: Ms. Wynn, if you'd like to say something,  
10 then you can let us know what you'd like to say, and if you'll  
11 give me a minute, I'll get my notepad back out and ready to go.  
12 Let's see, you are a class member who did not file an  
13 objection; is that right, Ms. Wynn?

14 MS. WYNN: Right, but --

15 THE COURT: I'm having a little trouble hearing you.  
16 Can you speak up, turn your volume up?

17 MS. WYNN: Yes, sir.

18 THE COURT: How do you spell your name, Ms. Wynn?

19 MS. WYNN: Whiskey Yankee November November.

20 THE COURT: Do you have a military background, do  
21 you?

22 MS. WYNN: Yes, sir.

23 THE COURT: Not many people left who know the old  
24 language. Okay, what would you like to say, ma'am?

25 MS. WYNN: Well, I basically have a question

1 regarding the documents that were posted on the website  
2 regarding this special elections, the appendix C options, and  
3 then also the appendix D sample letter. Paragraph 1A1, the  
4 option two for basic paid-up plus cash, in appendix C it refers  
5 to amount premiums paid up through December 31st, 2015, and  
6 then damages payment equal to premiums paid January 1st, 2016,  
7 through December 31, 2019. Appendix D, however, changes that  
8 to plus premiums you have paid on or after January 1st, 2020.

9 I have a 45 percent rate increase that went into  
10 effect December of 2019, so I have been paying these extra  
11 premiums. Will that be part of the basic paid-up amount?

12 THE COURT: I believe that's a question for  
13 plaintiffs' counsel to answer, and you need to come to the  
14 lectern so the court reporter can hear you.

15 MR. PENNY: Yes, Ms. Wynn, I think you are talking  
16 about the nonforfeiture option that will return to you some of  
17 your premiums but also retain a paid-up benefit, and you want  
18 to ensure that the payments that you are making in 2020 will be  
19 part of the paid-up benefit calculation, and I can understand  
20 your confusion, and you have a very detailed eye because what  
21 you picked up on is something that was stated in the settlement  
22 agreement that was then amended in the amended settlement  
23 agreement that corrects the issue that you are worried about.

24 The way we had initially described that benefit in  
25 the settlement agreement neglected to say what happens to the

1 2020 payment because I think we weren't thinking that the  
2 settlement process keeps playing out, so we amended it to make  
3 sure that your 2020 payments and any payments thereafter will  
4 be captured in the paid-up benefit. So I can give you that  
5 comfort.

6 THE COURT: When the special election letter goes out  
7 and the payment calculation is made.

8 MR. PENNY: Correct.

9 THE COURT: Does that answer your question, Ms. Wynn?

10 MS. WYNN: Yes, sir. Thank you.

11 THE COURT: Is there anything else you'd like, Ms.  
12 Wynn?

13 MS. WYNN: No. My husband says go Navy.

14 THE COURT: I'm an Army man, but I support Navy.  
15 Thank you very much for your participation. Is there anybody  
16 else who has anything who is on the telephone? Thank you, Ms.  
17 Brown, for reminding me of that.

18 THE CLERK: No one else has raised their hand.

19 THE COURT: Okay. That said, we will be in  
20 adjournment.

21 It's just too late in the day for me to go through it  
22 anymore. When do you want to do the attorneys' fees, folks? I  
23 can't do anything tomorrow or Thursday or Friday. I can't do  
24 anything again until July 27th or 28th. Also the 31st.

25 Counsel, I'm going to give you all preference

1 because -- on your date selection because you have the biggest  
2 job to deal with.

3 MR. PENNY: Your Honor, I can do the 27th or the  
4 28th. That would be my two preferences.

5 MR. DUVALL: Those dates are fine with Genworth.

6 THE COURT: 27th at 10:00 a.m. Ladies and gentlemen  
7 who are on the phone, if you want to participate, what do they  
8 do, call you or what, Ms. Brown?

9 THE CLERK: Yes, Judge, they would contact me  
10 directly. My phone number will be in the order, and once they  
11 contact me, I'll give them the Zoom credentials.

12 THE COURT: It's the same number, is it? So you have  
13 the number that you used today; is that right?

14 THE CLERK: No, sir. It will be a new invitation  
15 that will be sent out.

16 THE COURT: The same number or different number?

17 THE CLERK: It will be a different number.

18 THE COURT: So be on the lookout for that, and we  
19 have their names up here. Do we have ways to get hold of them?

20 THE CLERK: They will contact me directly.

21 THE COURT: Okay. So you call Ms. Brown directly,  
22 and do you have -- they have called you before, so they have  
23 your number. All right, thank you.

24 MR. PENNY: And, Ms. Brown, if you want to tell the  
25 people on the call that whatever order or information is

1 provided, it will be posted on the settlement website. They  
2 can consult that as well.

3 THE COURT: Very good, thank you. If you want the  
4 transcript, you need to order it, folks. And you might need it  
5 given some of the discussion that's gone on today in order for  
6 the things that you're going to have to respond to. All right,  
7 we will be in -- now we will be in adjournment.

8  
9  
10 (End of proceedings.)  
11  
12

13 I certify that the foregoing is a correct transcript  
14 from the record of proceedings in the above-entitled matter.  
15  
16

17 /s/  
18 P. E. Peterson, RPR

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Date

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